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IN THE
SUPREME Court OF THE UNITED STATES

LYN SWONGER and JAMES SPAULDING, individually, and on behalf of all other similarly Situated former Rock Island and St. Louis Southwestern Railway Company Trainmen of the United Transportation Union; et al.
Petitioners,
v.
SURFACE TRANSPORTATION BOARD and UNITED STATES OF AMERICA
Respondents.

UNITED TRANSPORTATION UNION ("UTU"); WAYNE A DAY; JOHN S. HOFFMAN; CLAYTON MILLS; UNION PACIFIC RAILROAD COMPANY,

Intervenors.
On Petition For Writ Of Certiorari
To the United States Court of Appeals
For the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do 49 U.S.C. §11341(a) and 49 U.S.C. §11347 allow the elimination of seniority prior rights as they are "rights, privileges and benefits" in that they constitute rates of pay, rules and working conditions under these statutes and under the New York Dock conditions?

2. What constitutes the standard of "necessity" as required by 49 U.S.C. §11341(a) and 49 U.S.C. §11347 for the elimination of seniority rights or for the elimination of a railroad terminal?

PARTIES TO THE PROCEEDING

Petitioners

LYN SWONGER and JAMES SPAULDING, individually, and on behalf of all other similarly Situated former Rock Island and St. Louis Southwestern Railway Company Trainmen and Members of the United Transportation Union; DOYLE BOYD; RICHARD HITZ; DAVE BODENHAMER; DENNIS SWIANTEK; RONNIE KESSLER; RICHARD HELSEL; CURTIS RANDOLPH; RICK HOLLAND; PHILLIP BRUNOW; CHARLES KIZZIRE; KENNETH ALDRICH; CHARLES KIZZIRE; KENNETH ALDRICH; RANDALL BROWN; JIM CROWDER; RICHARD HUMBLE; LOREN BETTLES; GARY POLK; F.A. CALLAWAY; T.E. LEATHERMAN, individually,

Respondents

SURFACE TRANSPORTATION BOARD ("STB") and UNITED STATES OF AMERICA,

Interveners on the side of Petitioners

WAYNE A. DAY; JOHN S. HOFFMAN; CLAYTON MILLS, UNION PACIFIC RAILROAD COMPANY,

Interveners on the side of Respondents

UNION PACIFIC RAILROAD COMPANY ("UNION PACIFIC") and UNITED TRANSPORTATION UNION ("UTU").

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OPINIONS BELOW

The opinion for the United States Court of Appeals for the Tenth Circuit is reported at 265 F. 3rd 1135. A copy of the Opinion is included in the Appendix ("App.") hereto at App. p. 3. The Opinion of the Surface Transportation Board is included in the Appendix hereto at App. p. 18. The Arbitrators Decision on March 25, 1999, is included herein at App. p. 26.

JURISDICTION

On June 16, 2000, Petitioners filed a Petition for Judicial Review from a decision of the Surface Transportation Board which the Tenth Circuit Court of Appeals denied on September 29, 2001. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Judicial Review. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. *28 U.S.C. §§ 2321, 2342*(5) and 2344. See also F.R.A.P. 15. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

STATUTORY PROVISIONS INVOLVED

49 U.S.C. §11321 formerly known as 49 U.S.C. § 11341 (See App. p. 33)

49 U.S.C. § 11326 formerly known as 49 U.S.C. § 11347 (See App. p. 34)

§§ 565, 566. Repealed. Pub. L. 103-272, § 7(b), July 5, 1994, 108 Stat. 1379 (See App. p. 35)

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New York Dock Conditions (See App. p. 40)

REPEAL OF 49 U.S.C. § 24706 (See App. p. 53)

STATEMENT OF THE CASE

The Petitioners appealed a ruling of the Surface Transportation Board (STB) refusing to review an arbitrator's decision to approve certain changes in the seniority status of the petitioners and in the relocation of their home terminal. Congress has enacted laws to encourage the consolidation of railroad operations, including 49 U.S.C. § 11321. Part (a) of that section exempts those participating in a transaction consolidating railroad operations from "antitrust laws and from all other law . . . as necessary to let that [carrier, corporation, or person] carry out the transaction." With that exemption comes a limitation: 49 U.S.C. § 11326 requires carriers participating in such a transaction to provide a "fair arrangement" for their employees. *See Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806, 813 (D.C. Cir. 1993) (*RLEA*). Section 11326 incorporates the protections of the Rail Passenger Service Act. 45 U.S.C. § 565, which provides that, in transactions approved by the Interstate Commerce Commission (ICC) (now transmogrified into the STB), "protective arrangements shall include . . . such provisions as may be necessary for . . . the preservation of rights, privileges, and benefits . . . under existing collective bargaining agreements . . . ."

The petitioners here were hired originally by the Rock Island and Pacific Railroad Company to work on its Tucumcari line. In 1980, after the Rock Island went bankrupt, SSW purchased part of that railroad, including the Tucumcari line. The SSW and several other railroads that had purchased parts of the Rock Island entered into an agreement with certain relevant labor unions providing for the preferential hiring of former Rock Island employees. This agreement, however, did not give these employees full carryover seniority, and the former Rock Island employees brought a class action lawsuit against the SSW and the UTU raising the carryover issue. *See Volkman v. UTU*, 724 F.Supp. 1282 (D. Kan. 1989), *rev'd on other grounds*, 73 F.3d 1047 (10th Cir. 1996). The *Volkman* court held that the former Rock Island employees were not entitled to full carryover seniority, and

instead, that their seniority date was established as their date of hire by the SSW. The court also held that the former Rock Island employees were entitled to "prior rights," which gave them preference over other SSW employees at the location where they were first hired by the SSW.

The present litigation arises out of a merger that again affected the petitioners' rights. In August 1996, the STB approved the merger of the Union Pacific and the Southern Pacific, with the Union Pacific as the surviving rail carrier. *See Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233 (1996), *aff'd sub nom. Western Coal Traffic League v. STB*, 169 F.3d 775 (D.C. Cir. 1999). When the STB first approved this transaction, it imposed on the merger certain employee protective provisions. Earlier, in *New York Dock Ry.-Control-Brooklyn E. Dist.*, 360 I.C.C. 60, 84, 90 (1979), *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979), the ICC had imposed a set of conditions and procedures on merging railroads to allow them to meet their obligations under § 11347 (now § 11326). Those conditions require the negotiation, and, if necessary, arbitration of agreements with labor organizations representing employees affected by a consolidation, merger or acquisition for the purpose of implementing operational changes. In accordance with Article I, Section 4 of the *New York Dock* conditions, which provides that railroads must negotiate with employees over any proposed rearrangement or displacement of personnel, the Union Pacific attempted to negotiate with the UTU over its plan to change contractual seniority policies and place the employees of the merged railroads under a single collective bargaining agreement. Under the proposed operating plan for the merger, the Union Pacific announced its intention to use a so-called "hub and spoke" system. Pursuant to that plan, the Union Pacific decided to create a "Salina hub" and, in that connection, to move petitioners' home terminal from Pratt, Kansas to Herington, Kansas. Employees of the merged railroads were to be dovetailed into the seniority list based on their date of hire at the property at which they were last employed. Thus, all names on the previously separate seniority rosters would be listed on a

single roster in order of seniority. *See Volkman*, 724 F.Supp. at 1288.

Under the proposed agreement, the petitioners' seniority would be determined by their dates of hire by the SSW. However, the prior rights to which they were previously entitled would be eliminated. There was objection to this elimination of prior rights. Exercising prerogatives under the UTU Constitution, a designated union officer voiced dissatisfaction with the loss of prior rights and thereby torpedoed the agreement. If parties to *New York Dock* negotiations cannot reach an agreement voluntarily, the matter in dispute must be submitted to mandatory binding arbitration. *See New York Dock*, 360 I.C.C. at 85. This procedure was followed and the arbitrator found the tentative agreement to be fair, and approved it. The petitioners then sought review of the arbitral award by the STB. That body examines arbitration decisions under a rather lenient standard of review. *See Chicago & N.W. Transp. Co.--Abandonment--Near Dubuque & Oelwein, Ia.*, 3 I.C.C.2d 729, 735-36 (1987) (*Lace Curtain*), *aff'd sub nom. IBEW*, *now codified at* 49 C.F.R. § 1115.8 (1999). In this case, the STB declined to review the arbitrator's decision, noting that the decision turned on the arbitrator's factual findings, which, according to the STB, deserved deference absent some egregious error. *See Lace Curtain*, 3 I.C.C.2d at 735. The petitioners appealed that decision to the Court of Appeals as a final order of the STB pursuant to 28 U.S.C. §§ 2321(a), 2342(5), 2343 and 2344.

As indicated, under the *Lace Curtain* standard, the STB declined to upset the arbitrator's decision. Under *Lace Curtain*, the agency's (then the ICC's) review was limited: it inquired whether an award was "procedurally fair and impartial," and would not vacate awards on substantive grounds "unless there is egregious error, the award fails to draw its essence from the collective bargaining agreement, or the arbitrator exceeds the specific contract limits on his authority." *Lace Curtain*, 3 I.C.C.2d at 735. Moreover, the agency (now the STB) limits its more detailed review of

arbitrators' decisions to "recurring or otherwise significant issues of general importance regarding the interpretation of [its] labor protection conditions." *Id.* at 736. If the STB declines to review an arbitrator's decision, that action may not be set aside unless it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. *See* 5 U.S.C. § 706(2)(a); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-44 (1983). The STB's interpretation of labor protective conditions (e.g., the *New York Dock* conditions ensuring railroad compliance with § 11326) is entitled to deference. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Under *Chevron*, we are generally required to defer to the agency's determination if "it is based on a permissible construction of the statute." *Id.* at 843. More specifically, if an appeals court finds "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," the Court must accept the agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44.

On June 16, 2000 these parties filed a Petition for Review with the Tenth Circuit Court of Appeals. The Petitioners requested the Court to review the Order and decision and to grant such relief as it my deem appropriate, on the ground that the order and decision were arbitrary, capricious, an abuse of discretion, or otherwise contrary to the constriction and the law.

On September 19, 2001 the 10th Circuit Court of Appeals filed its decision affirming the Decision of the Surface Transportation Board. It held that under article I, section 2 of the *New York Dock* conditions, certain employee privileges may not be abrogated by the STB. 360 I.C.C. at 84. Section 2 mandates that the "rates of pay, rules, working conditions and all collective bargaining and other rights, privileges, and benefits . . . under applicable laws and/or existing collective bargaining agreements shall be preserved unless changed by future collective bargaining agreements." *Id.* The petitioners argued that, under section 2, the arbitrator was without authority to approve a settlement that modified their seniority

rights because seniority rights are "rights, privileges, and benefits." In *CSX Corp.--Control--Chessie Sys., Inc. & Seaboard Coast Line Indus., Inc. (Arbitration Review)* Finance Docket No. 28905 (Sub-No. 27) (Nov. 22, 1995), the ICC held that seniority provisions did not fall under the rubric of protected "rights, privileges, and benefits." *Id.* The ICC defined those "rights, privileges, and benefits" that are absolutely protected from abrogation as constituting "the incidents of employment, ancillary emoluments or fringe benefits . . . ." *Id.* (quoted in *UTU v. STB*, 108 F.3d 1425, 1430 (D.C. Cir. 1997). These included, for example, life insurance, medical care, sick leave and vested and accrued benefits to which employees were entitled. The D.C. Circuit, in reviewing the ICC decision, found that conclusion to be reasonable. *See UTU*, 108 F.3d at 1429-30. The court reasoned that the classification reflected congressional intent.

Under the Commission's interpretation, 'rights, privileges and benefits' are protected absolutely, while other employee interests that are not inviolate are protected by a test of 'necessity,' pursuant to which there must be a showing of a nexus between the changes sought and the effectuation of an ICC-approved transaction. The Court of Appeals held that under this scheme, the public interest in effectuating approved consolidations is ensured without any undue sacrifice of employee interests. In justification of this distinction, the court accepted the ICC's assertion that a requirement of collective bargaining over seniority provisions would frustrate railroad merger transactions. *See id.* The court approved the ICC's reasoning that seniority provisions "have consistently been modified in the past in connection within [sic] consolidations. This may be due to the fact that almost all consolidations require scope and seniority changes in order to effectuate the purpose of the transaction. Railway Labor Act bargaining over these aspects of a consolidation would frustrate the transactions." *See UTU*, 108 F.23d at 1430 (quoting *CSX Corp.* at 15).

The Court of Appeals held that the Supreme Court explicitly recognized the possibility of adjusting collectively bargained terms in *Norfolk*, 499 U.S. at 132-33. 49 U.S.C. §

11341(a) (now § 11321(a)) provides that, in railroad transactions, participants are "exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [them] carry out the transaction . . . ." In *Norfolk*, the Court held that the exemption from "all other law" includes the obligations under a collective bargaining agreement; thus, the ICC (now the STB) may override such obligations if necessary to approve a transaction. *See id.* at 127-28.

The Court of Appeals further agreed that the STB's interpretation of the statute is reasonable. It held it is not manifestly arbitrary or capricious, and it carries out Congress' intent. It stated that Congress enacted laws to encourage railroad consolidations while imposing protective requirements to ensure that affected employees' interests be accommodated within reason. Without abrogating some rights, railroad consolidations would be difficult to achieve; that is why there are such extensive safeguards in place to accommodate employee interests. Specific seniority rights are individual rights that necessarily must be modified in some manner in most railroad consolidations; they stand in contrast to certain unmodifiable rights of labor--rights of the employees as a whole, as to which there usually a uniform union position--which require collective bargaining to be changed. For this reason, it found that the STB's interpretation is reasonable, and it concluded that seniority rights are not "rights, privileges, and benefits" within the meaning of the *New York Dock* conditions. It held that seniority rights could therefore properly be modified here by the arbitration award, provided that modification was necessary to carry out the merger.

As indicated, the Court of Appeals held a showing of "necessity" is required for the modification of seniority rights. *See* 49 U.S.C. §§ 11321(a) and 11326. The petitioners argued that there was no necessity here, and that therefore STB erred in approving the seniority modifications by concluding that they promoted transportation benefits associated with the merger. But the Appeals Court held petitioners' assignment of error to the STB and to the

arbitrator stemmed from a misconception of what is required to show necessity. The STB argued that, to justify a finding of necessity, one need only find 1) a nexus between the changes sought and the effectuation of the transaction, *see UTU*, 108 F.3d at 1430, and 2) real transportation benefits resulting from the underlying transaction, *see RLEA*, 987 F.2d at 815.

The Appeals Court agreed that the necessity standard does not require a finding by the arbitrator and the STB that the merger could not be effectuated without the specific changes that are proposed for the petitioners' seniority rights and for the designation of their home terminal. The Court of Appeals felt that seniority rights must almost always be adjusted to implement any merger. It also thought that the D.C. Circuit had recognized this problem and had required only that "the work transfer was 'necessary' for it yielded transportation efficiencies and was not aimed solely at abrogating a CBA provision." *ATDA*, 26 F.3d at 1165.

The Court of Appeals also found support in stating that the Supreme Court had also recognized the circumstances in which adjustments need to be made. It had held that the ICC (now the STB) may abrogate some terms of collective bargaining agreements affecting transactions if abrogation is necessary to effectuate them. *See Norfolk*, 499 U.S. at 127-28. This principle has been interpreted to mean that "the modification is necessary in order to secure to the public some transportation benefit flowing from the underlying transaction . . . ." *RLEA*, 987 F.2d at 815. The D.C. Circuit had explained this requirement:

> [T]he [agency] must find that the underlying transaction yields a transportation benefit to the public, "not merely [a] transfer [of] wealth from employees to their employer." [*RLEA*,] 987 F.2d at 815. In other words, the benefit cannot arise from the CBA modification itself; considered independently of the CBA, the transaction

must yield enhanced efficiency, greater safety, or some other gain.

American Train Dispatchers Ass'n v. ICC, 26 F.3d 1157, 1164 (D.C. Cir. 1994) (*ATDA*), *abrogated on other grounds*, *Rio Grande Pipeline Co. v. Federal Energy Regulatory Comm'n*, 178 F.3d 533 (D.C. Cir. 1999). Further, there must be "a nexus between the changes sought and the effectuation of an [agency-]approved transaction." *UTU*, 108 F.3d at 1430.

In this case, the arbitrator, in determining whether there was a public transportation benefit requiring the modification of seniority status, stated that he was "convinced that the successful implementation of the 'hub and spoke' operation at Salina is an obvious public transportation benefit and that considerations of efficiency of that operation warrant the modification and elimination of existing seniority rights as set forth in the proposed implementing agreement." (App. p. 31). The arbitrator further found that the agreement "fairly and equitably blends the rights of the petitioners with those of other affected employees." (App. p. 12). This was insufficient, the petitioners' contended, either to satisfy the requirement that the modifications are necessary or to constitute a factual finding warranting deferential review by the STB.

The petitioners argued that the necessity requirement mandates that the STB and the arbitrator set forth sufficient facts to disclose the basis on which the finding of necessity was made. Thus, the petitioners argued that the case should be remanded for such specific findings. The arbitrator explained the reason for his decision, and the STB does not review an arbitrator's factual determinations absent egregious error. The Court of Appeals held that to some extent, the existence of necessity is bolstered by procedural factors: the arbitrator held a full hearing and weighed the written and oral submissions of the parties. Absent clear error, the lack of a more detailed articulation of reasons is not enough to warrant disapproval by the STB under its lenient standard of review (although by so holding it stated it did not intend to derogate

the importance of an adequate statement of reasons). It concluded that under the *Lace Curtain* standard of review, fact-bound determinations such as the ones before it may not be overturned without a showing of egregious error. *See Lace Curtain*, 3 I.C.C.2d at 735; *see also ATDA*, 26 F.3d at 1163.

The petitioners also, for reasons similar to their seniority objections, challenged the plan to change the location of their home terminal from Pratt, Kansas to Herington, Kansas. They argued that the arbitrator and the STB failed to adequately consider the consequences of siting the home terminal at Herington, and that these decision-makers failed to explain why the employees' living arrangements had to be disrupted to make the merger possible. The petitioners argued that the general factors cited by the arbitrator--that the move would improve "adequacy of transportation to the public," "efficiency gains," "cost reductions," and "service improvements"--are insufficient to show the benefits of the move. They also pointed out the fact that the original plan was to retain Pratt as the home terminal, and the STB now has failed to demonstrate why moving the terminal to Herington produces more efficiency gains.

Further, the STB notes that the petitioners have failed to show the advantage of siting the home terminal at Pratt in preference to moving it to Herington; and there is nothing to undermine the arbitrator's finding that transportation benefits would result from the move. The arbitrator found that changing the location of the home terminal was "part and parcel of the hub and spoke operation . . . at Salina." It held that flexibility was made possible because the Herington base could support service in four directions: toward Pratt (west), Wichita (south), Kansas City (east), and Marysville, Kansas (north). The posture of the Herington base provided the flexibility to shift traffic from one route to another. The Court held that the arbitrator's finding that the move was necessary for the merger is not erroneous.

Further, the petitioners argued the arbitrator and STB failed to consider the lack of proper facilities in Herington for the employees who would be forced to move there.

Specifically, they argued that Herington did not have adequate housing and other facilities for transferred workers. In addition, the petitioners argued that the commuting distance from Pratt to Herington, 135 miles away, would be unacceptably long. But the Court noted that the petitioners did not deny that they continue to live and work in the Pratt area, and do not commute to Herington. It noted that the arbitrator "allowed the Union Pacific to accommodate [trainmen who did not transfer to Herington] by allowing those nine to 'not be required to commute to Herington for their assignments.'" Petitioners' Br. at 49. It also noted that if a lengthy commute had required the petitioners' relocation, the petitioners would have been entitled to moving allowances and other benefits under *New York Dock*. It affirmed the decision of the STB.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's Opinion Improperly Interprets 49 U.S.C. §11341(a) and 49 U.S.C. §11347 to allow the elimination of seniority prior rights and in so doing states they are not "rights, privileges and benefits" even though they are rates of pay, rules and working conditions under these statutes and under the New York Dock conditions.

In *Norfolk and Western Railway Company vs. American Train Dispatchers Association*, 499 U.S. 117,133, 113 L. Ed 2d 95, 111 S. Ct. 1156 (1991), the U.S. Supreme Court determined that modification of seniority agreements was allowable pursuant to 49 U.S.C. §11341(a). Yet that decision specifically reserved the question of limitations placed upon those changes by the requirement of necessity and the conditions of approval as it relates to the labor protective provisions. *Id. at* 127-128,134.

The dissent in *Norfolk and Western Railway Company vs. American Train Dispatchers Association* addressed this issue as follows:

> "There is tension between the Court's interpretation of the exemption that is now

> codified in 49 USC 11341(a) and the labor-protection conditions set forth in 49 USC 11347. The latter section requires an ICC order approving a railroad merger to impose conditions that are "no less protective" of the employees than those established pursuant to the Rail Passenger Service Act, 84 Stat. 1337, as amended, 45 USC 565. One of the conditions established by the Secretary of Labor under the latter Act was essentially the same as § 2 of the *New York Dock* conditions described by the Court, *ante*, at 120-121. As the Court notes, that condition provides that the benefits protected "'under applicable laws and/or existing collective bargaining agreements . . . shall be preserved unless changed by future collective bargaining agreements.'" *Id.*, at 121 (citation omitted). This provision unambiguously indicates that Congress intended and expected that collective-bargaining agreements would survive any ICC approved merger."

Norfolk and Western Railway Company vs. American Train Dispatchers Association, 499 U.S. 117, 142, 113 L. Ed 2d 95, 111 S. Ct. 1156 (1991). Accordingly, to consider the scope of this limitation upon the ability of an arbitrator or the STB to abrogate seniority conditions, we need to review the law as to the labor protective conditions.

When a proposed consolidation involves rail carriers, 49 U.S.C. §11347 requires the Commission to impose labor-protective conditions on the transaction to ensure a "fair arrangement" that will safeguard the interests of adversely affected employees. *United Transportation Union v. Surface Transportation Board,* 108 F.3d 1425,1426 (D.C. App. 1997). Also see *Railway Labor Executives' Ass'n v. United States*, 300 U.S. App. D.C. 142, 987 F.2d 806, 813 (D.C. Cir. 1993). In interpreting the safeguards required by § 11347, the

ICC held in *New York Dock* that "the rates of pay, rules, working conditions and all collective bargaining and other rights, privileges, and benefits ... under applicable laws and/or existing collective bargaining agreements ... shall be preserved unless changed by future collective bargaining agreements." 360 I.C.C. at 84. In other words, CBA terms that establish "rules, working conditions" and "other rights, privileges, and benefits" may not be abrogated outside of collective bargaining. See Paragraph 2 in the *New York Dock* conditions attached hereto as Attachment 3.

In *Railway Labor Executives' Ass'n v. United States*, 300 U.S. App. D.C. 142, 987 F.2d 806, 813 (D.C. Cir. 1993), the court considered the meaning of the phrase "rights, privileges, and benefits" and remanded that case to the Commission to allow the agency to explain the meaning of the phrase "rights, privileges, and benefits." See 987 F.2d at 814.

In the case of *CSX Corporation--Control--Chessie System, Inc. and Seaboard Coast Line Industries, Inc., et al* (Arbitration Review) Finance Docket No. 28905 (Sub-No. 27) 10 I.C.C. 2d 831 (ICC 1995) the ICC made this determination. It determined that the term "rights, privileges, and benefits" meant the incidents of employment, or fringe benefits and does not include scope or seniority provisions. *Id.* at 37. Due to the importance of this particular ruling, this case will be further explored below.

Thereupon, in the case of *United Transportation Union v. Surface Transportation Board*, 108 F.3d 1425, 1429, (D.C. App. 1997), the Court adopted the ICC/STB definition that excluded the concept of seniority rights from the definition of the phrase "other rights, privileges, and benefits." The Court noted that no party had suggested that seniority provisions fall within the encompass of the phrase "rates of pay, rules, working conditions" under *New York Dock*, so the scope of that phrase was not an issue in that case - it was only the meaning of "other rights, privileges, and benefits" that was at issue. *United Transportation Union v. Surface*

Transportation Board, 108 F.3d 1425, 1429, Note 4 (D.C. App. 1997).

The effect of the court in *United Transportation Union v. Surface Transportation Board,* 108 F.3d 1425 addressing the concept of "rules, working conditions" not being at issue in that case and that the phrase at issue was "other rights privileges and benefits" is substantial in correctly addressing this matter. This is as a result of the combined consideration of the provisions of 48 U.S.C. §11347 with 45 U.S.C. §565 with the provisions of Paragraph 2 of the *New York Dock* conditions. First, the labor-protection conditions set forth in 49 U.S.C. §11347 require an ICC/STB order approving a railroad merger to impose conditions that are "no less protective" of the employees than those established pursuant to the Rail Passenger Service Act, 84 Stat. 1337, as amended, 45 U. S. C. § 565. It stated as follows:

> "When a rail carrier is involved in a transaction for which approval is sought under §§11344 and 11345 or [under] §11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under §405 of the Rail Passenger Service Act (45 U.S.C. §565)."

The Rail Passenger Service Act, 45 U.S.C. §565, provided in pertinent part as follows:

> " .....the protective arrangements shall include ... such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits ... to such [rail] employees under existing collective bargaining agreements; (2) the continuation of collective bargaining rights; [and] (3) the

> protection of such employees against a worsening of their positions with respect to their employment.... Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act [49 USC §11347].

Finally, Section 2 of the *New York Dock* conditions provides as follows:

> "The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes." (emphasis added).

A normal reading of Section 2 of the *New York Dock* conditions demonstrates that the phrase "other rights, privileges and benefits" follows the phrase "pay, rules, working conditions" and states that both "pay, rules, working conditions" and "other rights, privileges and benefits" are to be protected. As such, it makes sense that seniority rights, which are in the nature of "rules, working conditions" are not within the phrase "other rights, privileges and benefits" as that phrase is used in Section 2. This result is in accordance with the result, although not the reasoning, of *CSX Corporation--Control--Chessie System, Inc. and Seaboard Coast Line Industries, Inc., et al* (Arbitration Review) Finance Docket No. 28905 (Sub-No. 27) 10 I.C.C. 2d 831 (ICC 1995). As this portion of the law was not at issue in the case of *United Transportation Union v. Surface*

Transportation Board, 108 F.3d 1425, 1429, Note 4 (D.C. App. 1997) this result and reasoning is not in conflict with that cases analysis and holding.

However, we next need to consider the effect of the language of the Rail Passenger Service Act, 45 U.S.C. §565 which does use the phrase of as follows: "the protective arrangements shall include ... such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits..." Of course, a normal reading of this statutory language also is consistent with the interpretation that "rules, working conditions" are such "rights, privileges and benefits". Under Section 2 of the *New York Dock* provisions, the structure of the sentence makes it clear that "pay, rules, working conditions" are merely specific of types of "rights, privileges and benefits". As such a correct interpretation of the provisions of §565 demonstrates that this section does not break the description down into a listing of specifically stated types of rights, privileges and benefits followed by a general description of those that are not specifically named. Rather §565 merely uses the general category of description to cover all of the rights, privileges and benefits. It would make sense that seniority rights would be within the definition of "rights, privileges and benefits" as that phrase is used in the Rail Passenger Service Act, 45 U.S.C. §565.

The STB, however, has not taken this view of the matter. In *CSX Corporation--Control--Chessie System, Inc. and Seaboard Coast Line Industries, Inc., et al* (Arbitration Review) Finance Docket No. 28905 (Sub-No. 27) 10 I.C.C. 2d 831, (ICC 1995) it clearly held that scope and seniority provisions are not within the realm of protected rights, privileges and benefits. It did so by relying upon Paragraph 10 of the Model Protective Agreement approved by the Secretary of Labor. See *CSX Corporation--Control--Chessie System, Inc. and Seaboard Coast Line Industries, Inc., et al* (Arbitration Review) Finance Docket No. 28905 (Sub-No. 27) 10 I.C.C. 2d 831 (ICC 1995); 49 U.S.C. §5333(b) and 29 CFR 215.6. But the error of the STB/ICC is that it relies upon Paragraph 10 of the Model agreement. That paragraph states

that "No employee receiving a dismissal or displacement allowance shall be deprived during his protection period, of any rights, privileges, or benefits attaching to his employment....". Accordingly, by its terms it is limited to applying to a period when an employee is receiving a displacement allowance. Such an employee would not then be using any seniority or be working under any conditions or even be getting any wages. The paragraph is not applicable and does not properly address the issue. Rather the paragraph which more properly is indicative of the level of protection is Paragraph 3 of the Model Agreement. It provides as follows:

> 3) All rights, privileges, and benefits (including pension rights and benefits) of employees covered by this arrangement (including employees having already retired) under existing collective bargaining agreements or otherwise, or under any revision or renewal thereof, shall be preserved and continued; provided, however, that such rights, privileges and benefits which are not foreclosed from further bargaining under applicable law or contract may be modified by collective bargaining and agreement by the Recipient and the union involved to substitute other rights, privileges and benefits. Unless otherwise provided, nothing in this arrangement shall be deemed to restrict any rights the Recipient may otherwise have to direct the working forces and manage its business as it deems best, in accordance with the applicable collective bargaining agreement.

See the Operating Assistance Protective Arrangement Pursuant To Section 5333(B) of Title 49 of the U.S. Code, Chapter 53 (App. p. 41). This paragraph more completely addresses the issue of what rights, privileges and benefits are actually protected under these provisions. The holdings to

the contrary by the STB are in error and the Court of Appeals errs in upholding the STB on this issue.

Indeed, the reason the Courts have focused on the definition of "rights, privileges and benefits" is because if those are involved, then the collective bargaining agreement terms as to those rights cannot be modified by the STB or its arbitrator, even with a showing of necessity. See *United Transportation Union v. Surface Transportation Board*, 108 F.3d 1425, 1427 (D.C. App. 1997). These former RI/SP trainmen contend that seniority rights, and in particular their prior right seniority rights, are rules and working conditions which are "rights, privileges and benefits" which could not properly be taken away by the STB or its arbitrator under the *New York Dock* conditions.

II. The Tenth Circuit's Opinion Improperly Interprets As To What Constitutes The Standard Of "Necessity" As Required By 49 U.S.C. §11341(A) And 49 U.S.C. §11347 and Thereby Allows For The Unnecessary Elimination Of Seniority Rights and a Railroad Terminal.

This issue concerns the basic question of what is the level of the standard of necessity and what can be modified under that standard. This question addresses the standard of the law required before a collective bargaining agreement can be modified in a *New York Dock* proceeding. Former 49 USC §11341(a) provided:

> ". . . A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. . . ."

Accordingly, in *Norfolk and Western Railway Company vs. American Train Dispatchers Association*, 499 U.S. 117, 113 L. Ed 2d 95, 111 S. Ct. 1156 (1991), the U.S. Supreme Court held as follows:

> We hold that, as necessary to carry out a transaction approved by the Commission, the term "all other law" in Section 11341(a) includes any obstacle imposed by law. In this case, the term "all other law" in Section 11341 (a) applies to the substantive and remedial law respecting enforcement of collective bargaining agreements. Id. at 499 U.S. 133.

Based upon this case the Tenth Circuit concludes that the seniority arrangement in this case is allowably to be established in this Arbitration Decision. However, this reading of the Supreme Court's decision does not address the entire issue. The Supreme Court, in the *American Train Dispatchers Association* case above, also held as follows:

> The immunity provision does not exempt carriers from all law, but rather from all law necessary to carry out an approved transaction. Neither the conditions of approval, nor the standard for necessity, is before us today. It may be, as the Commission held on remand from the Court of Appeals, that the scope of the immunity provision is limited by Section 11347, which conditions approval of a transaction on satisfaction of certain labor protective conditions.
>
> See n 2, *supra*. It might also be true that "[t]he breadth of the exemption [in Section 11341(a) is defined by the scope of the approved transaction... ICC vs. Locomotive Engineer, supra at 298, 96 L. Ed. 2d 222, 107 S. Ct. 2360 (Stevens, J. concurring in judgment). We express no view on these matters, as they are not before us here.

See Norfolk and Western Railway Company vs. American Train Dispatchers Association, 499 U.S. at 134.

As noted by the Supreme Court, of particular importance is that both (1) the standard of necessity that must be met before a change in seniority can be made as well as (2) a determination of whether other provisions exist stating the rights can be changed at all without collective bargaining were not being decided by the Court and were being reserved for future decision. The Tenth Circuit in this case failed to properly apply these legal matters and actually states the issues were decided by the *American Dispatchers* decision.

As noted the Supreme Court did not decide in *American Dispatchers* whether the standard of necessity had been met. That issue had not been appealed and was not challenged. *Id.* at 127. The Arbitrator in the present case stated that since the "hub and spoke" operation was of public benefit with considerations of efficiency of the operation, a public benefit had been shown and the seniority rights could be modified in the way set forth in his decision. (App. p. 32). The STB then stated that this was a factual finding to which it must give deference to the Arbitrator under *Lace Curtain.* (App. p. 23). It should be noted that the STB, and the Court of Appeals, thereby affirmed that standard as the legal standard for the determination of necessity and that they would not otherwise review if that legal standard was met in an appeal.

This reference in the majority opinion of the *Train Dispatchers* case is in response to the statements of the dissenting opinion in that case as to tension between the Court's interpretation of the exemption and the labor protection conditions. In particular the following was set forth in the dissenting opinion:

> "There is tension between the Court's interpretation of the exemption that is now codified in 49 USC 11341(a) and the labor-protection conditions set forth in 49 USC 11347. The latter section requires an ICC order approving a railroad merger to impose conditions that are "no less protective" of the employees than those

established pursuant to the Rail Passenger Service Act, 84 Stat. 1337, as amended, 45 USC 565. One of the conditions established by the Secretary of Labor under the latter Act was essentially the same as § 2 of the *New York Dock* conditions described by the Court, *ante*, at 120-121. As the Court notes, that condition provides that the benefits protected "'under applicable laws and/or existing collective bargaining agreements . . . shall be preserved unless changed by future collective bargaining agreements.'" *Id.*, at 121 (citation omitted). This provision unambiguously indicates that Congress intended and expected that collective-bargaining agreements would survive any ICC approved merger."

American Train Dispatchers Association, 499 U.S. 117, 142, 113 L. Ed 2d 95, 111 S. Ct. 1156 (1991).

There have been only a few court decisions relating to this issue. First to consider would be the case of *Railway Labor Executives' Ass'n v. United States*, 300 U.S. App. D.C. 142, 987 F.2d 806, 814 (D.C. Cir. 1993). In *Executives* the Court was faced with a determination by an Arbitrator and the STB that the changes in the seniority provisions of the collective bargaining agreement were "necessary". The Court initially states "that whatever else a "fair arrangement" entails, the modification of a CBA must at a minimum be necessary to effectuate a transaction." *Id.* at 813. The Court went on to state as follows:

"What, then, does it mean to say that it is necessary to modify a CBA in order to effectuate a proposed transaction? In this case the Commission reasonably interpreted this standard to mean "necessary to effectuate the purpose of the transaction." If the purpose of the lease transaction were merely to abrogate the terms of a CBA, however, then "necessity" would be no limitation at all upon the Commission's authority

> to set a CBA aside. We look therefore to the purpose for which the ICC as been given this authority. That purpose is presumably to secure to the public some transportation benefit that would not be available if the CBA were left in place, not merely to transfer wealth from employees to their employer. Viewed in that light, we do not see how the agency can be said to have shown the "necessity" for modifying a CBA unless it shows that the modification is necessary in order to secure to the public some transportation benefit flowing from the underlying transaction (here a lease)."

Id. at 814. In applying that test, the Court was required to remand the case to the STB as neither the STB nor the Arbitrator had set forth sufficient facts to determine on what basis the decision of necessity was being made. It noted that the STB had simply stated that there were "public interest factors" weighing in favor of the transaction and that these factors include the "benefits that flow from the creation of a more competitive and efficient rail carrier," *Id. at 814.* From such a general statement there was no way to determine that the "transportation benefits would arise solely from modifying the CBAs--in which case they would not be cognizable, per the analysis above—or rather found that the underlying leases would give rise to transportation benefits that could not be realized except by modifying the CBAs." *Id. at 814.* The Arbitrator seemed, however, to focus on the savings to be made from the modifications of the CBAs themselves. *Id. at 814-815.* As there is a clear analogy to the facts of this case, it is helpful to set forth here the reasons given for the modifications by the Arbitrator, to-wit:

> "In the opinion of [the carrier], these lease transactions confirmed its view that operations conducted under the ST collective bargaining agreement resulted in lower operating costs and enhanced service levels. Specifically, [the carrier] concluded that reduced train and engine

> service manning levels, lower rates of pay and non-payment of arbitraries, permitted by the ST-UTU collective bargaining agreement were responsible for the reduced operating costs. J.A. 228. See also J.A. 54-57 (Commissioners Lamboley and Simmons, dissenting in part) (noting that no showing of necessity had been made by Commission in authorizing changes to CBAs)."

Id. at 814-815. The Court went on to note that this statement made it impossible to determine "whether enhanced service levels would result solely from the reduced labor cost stemming from the modifications to the CBAs--when a producer's marginal cost declines it increases its output, i.e. service--or whether the leases themselves yield increased efficiencies." *Id. at 815.* Remand to the agency was necessary.

In the case of *United Transportation Union v. Surface Transportation Board,* 108 F.3d 1425 (D.C. App. 1997) the Court found that the standard of necessity had been met. In so doing, it used language somewhat different from the language set forth in the *Executives* case. Here it stated:

> "CSXT argued, and the ICC accepted, that a consolidation of seniority rosters was necessary to effectuate the merger of the rail lines. This is both obvious on its face and was demonstrated by CSXT. First, there is little point in consolidating railroads on paper if a consolidation of operations cannot be achieved. It is obvious that separate and distinct parts, operating separately and distinctly, will not generate the value of consolidation. Second, CSXT demonstrated that changing crews at previous territorial boundaries of the former railroads, as would be required with separate seniority rosters, would increase costs and slow down transit times. Improvements in efficiency generated by a consolidated seniority

roster will reduce CSXT's cost of service, resulting in reduced rates to shippers and ultimately to consumers. The unions offered no evidence to the arbitrator or Commission to challenge CSXT's contentions of improved efficiency. Indeed, at oral argument, the unions' counsel conceded that these efficiencies are not open to dispute. In short, the record supports the Commission's finding that CSXT's proposed changes to the CBAs are necessary to effectuate the ICC-approved transaction."

United Transportation Union v. Surface Transportation Board, 108 F.3d at 1431.

Finally, in *American Train Dispatchers Association v. Interstate Commerce Commission*, 54 F.3d 1157, 1165 (D.C. Cir. 1995), the Court stated that a standard that provides that "necessity" is satisfied any time the CBA is an impediment to the transaction is a misstatement of the correct legal standard. It went on to hold that the arbitrator's finding that consolidating the power distribution functions in one location would facilitate power allocation decisions across the railroad network. *Id.* at 1165. Accordingly, the standard of necessity was met.

In the present case, the former RI/SP trainmen complain of the deprivation of their prior right seniority status. In other words, these former RI/SP trainmen complained to the Arbitrator and to the STB that the standard of "necessity" did not justify the modification which deprived them of their prior right seniority status. That issue was side-stepped by both the Arbitrator, the STB and the Court of Appeals. The Arbitrator merely stated as follows:

"The dissenting employees contest that there is a public transportation benefit in this case necessitating the alteration of seniority rights as contemplated by the proposed implementing agreement. However, after thoroughly reviewing

> the record in this case, the undersigned is convinced that the successful implementation of the "hub and spoke" operation at Salina is an obvious public transportation benefit and that considerations of efficiency of that operation warrant the modification and elimination of existing seniority rights as set forth in the proposed implementing agreement."

(App. p. 31). The STB in ruling on this stated that this was a factual finding to which it would accord deference under *Lace Curtain*, that the finding was not egregious and declined to review the finding. (App. p. 23). The Court of Appeals did likewise. (App. p. 12).

Yet, this is neither a finding of fact nor a finding sufficient to meet the issue of "necessity". Additionally, this ruling fails to give any kind of review on appeal of these kind of application of facts to law decisions being made by an arbitrator.

The cases cited above show that Courts of Appeal cannot review the legal sufficiency of the evidence and determinations on the issue of necessity unless the Arbitrator or the STB articulate that information. Here the Arbitrator makes only a generalization and the STB declines to review the matter and the Court of Appeals merely adopts the generalized language. That leaves the present state of the record unclear and without sufficient information for a Court to fully address the rulings.

For example, there is no discussion as to the basis for the conclusion of the incompatibility of the prior right seniority rights of the former RI/SP trainmen with the "hub and spoke" operation. While the arbitrator makes the statement that the efficiencies of that operation warrant the modification "and elimination" of the existing seniority rights as contemplated in the implementing agreement, there is no explanation given as to what that inconsistency is with these former RI/SP trainmen prior rights to certain trackage. There is no

discussion as to the kinds of public transportation efficiencies that will be gained by the elimination of the prior right seniority of the former RI/SP trainmen. Indeed the trackage upon which the former RI/SP trainmen hold prior rights will continue to be within the Salina hub. The fact that prior rights in and of itself is not inconsistent with the hub and spoke system is evident in that the Arbitrator and STB approved an implementing agreement that preserves the prior rights of other employees in the Expanded Salina Hub. All that has happened is that the seniority arrangements have been changed so that these former RI/SP trainmen (former Rock Island employees who were successful against the union and the carrier in a previous breach of the duty of fair representation suit) have been deprived of the prior right seniority obtained through previous lawsuit. The Arbitrator did not explain why this elimination of prior right seniority was necessary to achieve a public transportation benefit. The STB declined to review this legal determination and added nothing for this Court for evaluation and the Court of Appeal fails to apply any review.

To summarize this succinctly, these former RI/SP trainmen had prior right seniority to operate trackage between Herrington and Pratt. While they had system seniority dates of March 23, 1980, they had prior right seniority that gave them the equivalent of their hire date on the property, i.e. when the trackage was operated by the Rock Island Railroad. The consolidation into Salina for a hub and spoke system does not establish a public transportation benefit vis-à-vis the retention of these prior rights, or the corresponding hire date that is protected by the prior right status. Rather the change which the Arbitrator relies upon to show public benefit, as it relates to these former RI/SP trainmen prior seniority rights, appears to be a change that is not "necessary" in order to effectuate the transaction. It is instead, just a method to transfer the wealth of the employees (these former RI/SP trainmen with prior right seniority earned and established through many years of railroad employment on this very trackage) to the Union Pacific. In other words, since the hub and spoke system could operate and be effectuated without depriving these former RI/SP trainmen of their prior rights,

that modification of the seniority rights to the extent of complete elimination is not "necessary" and is not permissible under 49 U.S.C 11341(a) and *Norfolk and Western Railway Company vs. American Train Dispatchers Association*, 499 U.S. 117, 113 L. Ed 2d 95, 111 S. Ct. 1156 (1991).

This issue is the same as applied to the issue of the necessity of the elimination of the terminal at Pratt, Kansas. Here the question relates to the necessity of the elimination of Pratt, Kansas as a terminal. The arbitrator states that relocation of the terminal is "part and parcel of the hub and spoke operation to be implemented at Salina. Accordingly, the public transportation benefit is demonstrated." (App. p. 32). He made no further statements to support a determination of the meeting of the test of necessity.

The STB did make various comments as to this issue. It stated that it realized that to meet the statutory requirement that the transaction be found to be consistent with the public interest, it had to examine the effect of the transaction on the adequacy of transportation to the public. (App. p. 24). That in turn caused it to determine the "public benefits" that would result from the transaction which it defined as "efficiency gains, such as cost reductions and service improvements". (App. p. 24). It then states that it had decided that the Union Pacific should realize public benefits of $534 million per year from more efficient operations. (App. p. 24). Among the efficiencies specifically discussed were the streamlining and consolidation of transportation functions and operations at major terminals. (App. p. 24). Accordingly, the STB said the Arbitrator found that Union Pacific's hub and spoke operation at Salina was an obvious transportation benefit. (App. p. 25). It is then asserted that in any event these types of matters are properly compensated for by moving allowances and other benefits under *New York Dock*. (App. p. 25). It should be noted that this ruling neither addressed the arguments of the former RI/SP trainmen nor is even specific itself as to the "other benefits" it refers to under *New York Dock*.

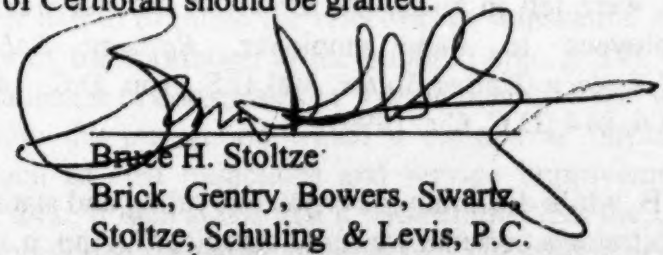
In this case, the original plan to implement the "hub and spoke" operation was to have Pratt remain as the home terminal. (App. p. 13). The plan now approved by the Arbitrator and the STB eliminates Pratt as a home terminal, but retains it as an away from home terminal. (App. p.13). The STB did not address this change in plan in its decision. (App. p. 24). The effect of this change in home terminal status is to cause the continued operation of the terminal at Pratt, the continued location of employees there, the continued switching of pools there, the continued location of employees while off duty there—just away from home. How any of this results in increased efficiencies of operations and cost savings is not addressed in the decision of the Arbitrator nor of the STB nor of the Court of Appeals. The agency does not show the "necessity" for modifying a CBA unless it shows that the modification is necessary in order to secure to the public some transportation benefit flowing from the underlying transaction. That is presumably to secure to the public some transportation benefit that would not be available if the CBA were left in place, not merely to transfer wealth from employees to their employer. *Railway Labor Executives' Ass'n v. United States*, 300 U.S. App. D.C. 142, 987 F.2d 806, 814 (D.C. Cir. 1993).

The STB, while declining to review this ruling and stating that the Arbitrator's decision was not "egregious" (App. p. 6), did not make this finding a part of its decision. Instead it confuses the issue of the determination of the "public benefit" to allow the merger to occur with the determination of "necessity" to allow a CBA to be changed. It also wrongly asserts this is an issue for which compensation is made under the *New York Dock* provisions of "moving allowance" and "other benefits"(Pet. App. P. 330). It should be noted that the STB ignores that receiving money for your house and relocation as allowed for a "moving allowance" is hardly compensation for inadequate housing in the new location the worker has been forced to relocate to. Secondly, by using the vague and ambiguous phrase "other benefits" the STB makes it sound like its *New York Dock* provisions provide for inadequate schools, public water supplies, community

centers, shopping and grocery stores etc. Indeed the action of the STB in using such vague and ambiguous language rather than specifying the specific provision compensate for these adverse conditions, is a sign that the STB was making it look like something was there for these employees when it really is not. Indeed, it is not. It also should make this Court realize that the STB was stretching in order to provide support for a proposition that is simply wrong. The "public benefit" of that change itself must be shown to allow for the CBA to be modified. The public is not benefited when employees and their families are required to move to towns of inadequate facilities. This kind of thing is not accounted for in the *New York Dock* provisions.

CONCLUSION

Accordingly, these parties submit these issues justify a reversal of the decision of the Arbitrator and the Surface Transportation Board. For the foregoing reasons, the Petition for Writ of Certiorari should be granted.



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Petitioners,

v.

SURFACE TRANSPORTATION BOARD and UNITED STATES OF AMERICA,

Respondents,

UNITED TRANSPORTATION UNION ("UTU"); WAYNE A. DAY; JOHN S. HOFFMAN; CLAYTON MILLS; UNION PACIFIC RAILROAD COMPANY,

Intervenors.

No. 00-9518

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

265 F. 3d 1135
C.A. 10, 2001

June 16, 2000,
Submitted

September 19, 2001,
Filed

SUBSEQUENT HISTORY:

_____.

PRIOR HISTORY:
Appeal of the ruling of the Surface Transportation Board (STB) refusing to review an arbitrator's decision to approve certain changes in the seniority status of the petitioners and in the relocation of their home terminal.

DISPOSITION:
Affirmed decision of Surface Transportation Board

COUNSEL:
Counsel who presented argument on behalf of the appellant was Bruce H. Stoltze of Des Moines, IA.

Counsel who presented argument on behalf of the Respondent, Surface Transportation Board was Marilyn R. Levitt, Attorney, (Ellen D. Hanson, General Counsel, Craig M. Yeats, Deputy General Counsel, and Louis Mackall, V, Attorney, with her on the brief) of Washington, D.C.

Counsel who presented argument on behalf of the Respondent-Intervener Union Pacific Railroad Company was Brenda J. Council, Kutak Rock LLP, Omaha, Nebraska

Counsel who filed a brief on behalf of the Respondent-Intervener United Transportation Union was Joseph A. Guerrieri, Jr. and John A. Edmond, Guerrieri, Edmond & Clayman, P.C., Washington, D.C.

JUDGES:

Before **EBEL, MCKAY,** and **CUDAHY,** Circuit Judges.
The Honorable Richard D. Cudahy, United States Circuit Judge for the Seventh Circuit, sitting by designation

OPINION BY: Cudahy, Circuit Judge

OPINION:

The petitioners appeal a ruling of the Surface Transportation Board (STB) refusing to review an arbitrator's decision to approve certain changes in the seniority status of the petitioners and in the relocation of their home terminal. The changes were included in an agreement negotiated between the Union Pacific Railroad Company and the United Transportation Union (UTU). This agreement implemented the consolidation of operations and workforces of the Union Pacific and its affiliates with the Southern Pacific Transportation Company and its affiliates, including the St. Louis Southwestern Railway (SSW). In addition to the STB, the Union Pacific and the UTU have filed briefs as interveners in support of the ruling. For the reasons set forth below, we affirm the decision of the STB declining to overturn the arbitrator's decision.

I.

Congress has enacted laws to encourage the consolidation of railroad operations, including 49 U.S.C. § 11321. Part (a) of that section exempts those participating in a transaction consolidating railroad operations from "antitrust laws and from all other law . . . as necessary to let that [carrier, corporation, or person] carry out the transaction." With that exemption comes a limitation: 49 U.S.C. § 11326 requires carriers participating in such a transaction to provide a "fair arrangement" for their employees. *See Railway Labor Executives' Ass'n v. United States*, 987 F.2d 806, 813 (D.C.

Cir. 1993) (*RLEA*). Section 11326 incorporates the protections of the Rail Passenger Service Act. 45 U.S.C. § 565, which provides that, in transactions approved by the Interstate Commerce Commission (ICC) (now transmogrified into the STB),[1] "protective arrangements shall include . . . such provisions as may be necessary for . . . the preservation of rights, privileges, and benefits . . . under existing collective bargaining agreements . . . ."

The petitioners here were hired originally by the Rock Island and Pacific Railroad Company to work on its Tucumcari line. In 1980, after the Rock Island went bankrupt,[2] SSW purchased part of that railroad, including the Tucumcari line.[3] The SSW and several other railroads that had purchased parts of the Rock Island entered into an agreement with certain relevant labor unions providing for the preferential hiring of former Rock Island employees. This agreement, however, did not give these employees full carryover seniority,[4] and the former Rock Island employees brought a class action lawsuit against the SSW and the UTU raising the carryover issue. *See Volkman v. UTU*, 724 F.Supp. 1282 (D. Kan. 1989), *rev'd on other grounds*, 73 F.3d 1047 (10th Cir. 1996). The *Volkman* court held that the former Rock Island employees were not entitled to full carryover seniority, and instead, that their seniority date was established as their date of hire by the SSW. The court also held that the former Rock Island employees were entitled to "prior rights," which gave them preference over other SSW employees at the location where they were first hired by the SSW.

The present litigation arises out of a merger that again affected the petitioners' rights. In August 1996, the STB approved the merger of the Union Pacific and the Southern Pacific, with the Union Pacific as the surviving rail carrier. *See Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233 (1996), *aff'd sub nom. Western Coal Traffic League v. STB*,

169 F.3d 775 (D.C. Cir. 1999).[5] When the STB first approved this transaction, it imposed on the merger certain employee protective provisions. Earlier, in *New York Dock Ry.-Control-Brooklyn E. Dist.*, 360 I.C.C. 60, 84, 90 (1979), *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979), the ICC had imposed a set of conditions and procedures on merging railroads to allow them to meet their obligations under § 11347 (now § 11326). Those conditions require the negotiation, and, if necessary, arbitration of agreements with labor organizations representing employees affected by a consolidation, merger or acquisition for the purpose of implementing operational changes.[6] In accordance with Article I, Section 4 of the *New York Dock* conditions, which provides that railroads must negotiate with employees over any proposed rearrangement or displacement of personnel, the Union Pacific negotiated with the UTU over its plan to change contractual seniority policies and place the employees of the merged railroads under a single collective bargaining agreement.[7] Under the negotiated operating plan for the merger, the Union Pacific announced its intention to use a so-called "hub and spoke" system. Pursuant to that plan, the Union Pacific decided to create a "Salina hub" and, in that connection, to move petitioners' home terminal from Pratt, Kansas to Herington, Kansas.[8] Employees of the merged railroads were to be dovetailed into the seniority list based on their date of hire at the property at which they were last employed. Thus, all names on the previously separate seniority rosters would be listed on a single roster in order of seniority. *See Volkman*, 724 F.Supp. at 1288.

Following the principle of the *Volkman* litigation, under the present agreement, the petitioners' seniority would continue to be determined by their dates of hire by the SSW. However, the prior rights that they had previously exercised with respect to other SSW employees would be eliminated. There

was, however, objection to this elimination of prior rights. Exercising prerogatives under the UTU Constitution, a designated union officer voiced dissatisfaction with the loss of prior rights and thereby torpedoed the agreement.[9] If parties to *New York Dock* negotiations cannot reach an agreement voluntarily, the matter in dispute must be submitted to mandatory binding arbitration. *See New York Dock*, 360 I.C.C. at 85. This procedure was followed and the arbitrator found the tentative agreement to be fair, and approved it. The petitioners then sought review of the arbitral award by the STB. That body examines arbitration decisions under a rather lenient standard of review. *See Chicago & N.W. Transp. Co.--Abandonment--Near Dubuque & Oelwein, Ia.*, 3 I.C.C.2d 729, 735-36 (1987) (*Lace Curtain*), *aff'd sub nom. IBEW*, *now codified at* 49 C.F.R. § 1115.8 (1999). In this case, the STB declined to review the arbitrator's decision, noting that the decision turned on the arbitrator's factual findings, which, according to the STB, deserved deference absent some egregious error. *See Lace Curtain*, 3 I.C.C.2d at 735.[10] The petitioners appeal that decision as a final order of the STB pursuant to 28 U.S.C. §§ 2321(a), 2342(5), 2343 and 2344.

As indicated, under the *Lace Curtain* standard, the STB declined to upset the arbitrator's decision. Under *Lace Curtain*, the agency's (then the ICC's) review was limited: it inquired whether an award was "procedurally fair and impartial," and would not vacate awards on substantive grounds "unless there is egregious error, the award fails to draw its essence from the collective bargaining agreement, or the arbitrator exceeds the specific contract limits on his authority." *Lace Curtain*, 3 I.C.C.2d at 735. Moreover, the agency (now the STB) limits its more detailed review of arbitrators' decisions to "recurring or otherwise significant issues of general importance regarding the interpretation of [its] labor protection conditions." *Id.* at 736. If the STB

declines to review an arbitrator's decision, that action may not be set aside unless it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. *See* 5 U.S.C. § 706(2)(a); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-44 (1983). The STB's interpretation of labor protective conditions (e.g., the *New York Dock* conditions ensuring railroad compliance with § 11326) is entitled to deference. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Under *Chevron*, we are generally required to defer to the agency's determination if "it is based on a permissible construction of the statute." *Id.* at 843. More specifically, if we find "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," we must accept the agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44. And the D.C. Circuit has observed that "courts owe even greater deference to agency interpretations of agency rules than . . . to agency interpretations of ambiguous statutory terms." *Consolidated Rail Corp. v. ICC*, 43 F.3d 1528, 1532 (D.C. Cir. 1995) (internal quotations and citations omitted).

II.

Under article I, section 2 of the *New York Dock* conditions, certain employee privileges may not be abrogated by the STB. 360 I.C.C. at 84. Section 2 mandates that the "rates of pay, rules, working conditions and all collective bargaining and other rights, privileges, and benefits . . . under applicable laws and/or existing collective bargaining agreements shall be preserved unless changed by future collective bargaining agreements." *Id.* The petitioners argue that, under section 2, the arbitrator here was without authority to approve a settlement that modified their seniority rights because, they argue, seniority rights are "rights, privileges, and benefits."

Whether seniority rights are "rights, privileges, and benefits" is a question of first impression in the Tenth Circuit. However, the ICC and the D.C. Circuit have addressed the issue--quite persuasively.

In *CSX Corp.--Control--Chessie Sys., Inc. & Seaboard Coast Line Indus., Inc. (Arbitration Review)* Finance Docket No. 28905 (Sub-No. 27) (Nov. 22, 1995), the ICC held that seniority provisions did not fall under the rubric of protected "rights, privileges, and benefits." *Id.* The ICC defined those "rights, privileges, and benefits" that are absolutely protected from abrogation as constituting "the incidents of employment, ancillary emoluments or fringe benefits . . . ." *Id.* (quoted in *UTU v. STB*, 108 F.3d 1425, 1430 (D.C. Cir. 1997). These included, for example, life insurance, medical care, sick leave and vested and accrued benefits to which employees were entitled. The D.C. Circuit, in reviewing the ICC decision, found that conclusion to be reasonable. *See UTU*, 108 F.3d at 1429-30. The court reasoned that the classification reflected congressional intent:

Under the Commission's interpretation, 'rights, privileges and benefits' are protected absolutely, while other employee interests that are not inviolate are protected by a test of 'necessity,' pursuant to which there must be a showing of a nexus between the changes sought and the effectuation of an ICC-approved transaction. Under this scheme, the public interest in effectuating approved consolidations is ensured without any undue sacrifice of employee interests. In our view, this is exactly what was intended by Congress.

108 F.3d at 1430. In justification of this distinction, the court accepted the ICC's assertion that a requirement of collective bargaining over seniority provisions would frustrate railroad merger transactions. *See id.* The court approved the ICC's reasoning that seniority provisions "have consistently been modified in the past in connection within [sic] consolidations.

This may be due to the fact that almost all consolidations require scope and seniority changes in order to effectuate the purpose of the transaction. Railway Labor Act bargaining over these aspects of a consolidation would frustrate the transactions." *See UTU*, 108 F.23d at 1430 (quoting *CSX Corp.* at 15).

The Supreme Court explicitly recognized the possibility of adjusting collectively bargained terms in *Norfolk*, 499 U.S. at 132-33. 49 U.S.C. § 11341(a) (now § 11321(a)) provides that, in railroad transactions, participants are "exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [them] carry out the transaction . . . ." In *Norfolk*, the Court held that the exemption from "all other law" includes the obligations under a collective bargaining agreement; thus, the ICC (now the STB) may override such obligations if necessary to approve a transaction. *See id.* at 127-28.

We agree that the STB's interpretation of the statute is reasonable. It is not manifestly arbitrary or capricious, and it carries out Congress' intent. Congress enacted laws to encourage railroad consolidations while imposing protective requirements to ensure that affected employees' interests be accommodated within reason. Without abrogating some rights, railroad consolidations would be difficult to achieve; that is why there are such extensive safeguards in place to accommodate employee interests. Specific seniority rights are individual rights that necessarily must be modified in some manner in most railroad consolidations; they stand in contrast to certain unmodifiable rights of labor--rights of the employees as a whole, as to which there usually a uniform union position--which require collective bargaining to be changed. For this reason, we find that the STB's interpretation is reasonable, and we conclude that seniority rights are not "rights, privileges, and benefits" within the meaning of the *New York Dock* conditions. Seniority rights

could therefore properly be modified here by the arbitration award, provided that modification was necessary to carry out the merger.

III.

As indicated, a showing of "necessity" is required for the modification of seniority rights. *See* 49 U.S.C. §§ 11321(a) and 11326. The petitioners argue that there was no necessity here, and that therefore STB erred in approving the seniority modifications by concluding that they promoted transportation benefits associated with the merger. But the petitioners' assignment of error to the STB and to the arbitrator stems from a misconception of what is required to show necessity. The STB argues that, to justify a finding of necessity, one need only find 1) a nexus between the changes sought and the effectuation of the transaction, *see UTU*, 108 F.3d at 1430, and 2) real transportation benefits resulting from the underlying transaction, *see RLEA*, 987 F.2d at 815.

We agree that the necessity standard does not require a finding by the arbitrator and the STB that the merger could not be effectuated without the specific changes that are proposed for the petitioners' seniority rights and for the designation of their home terminal.[11] First, as has been noted, seniority rights must almost always be adjusted to implement any merger. The D.C. Circuit recognized this problem and has required only that "the work transfer was 'necessary' for it yielded transportation efficiencies and was not aimed solely at abrogating a CBA provision." *ATDA*, 26 F.3d at 1165. As the D.C. Circuit has observed:

[T]here is little point in consolidating railroads on paper if a consolidation of operations cannot be achieved. It is obvious that separate and distinct parts, operating separately and distinctly, will not generate the value of the consolidation . . . . Improvements in efficiency generated by a consolidated

seniority roster will reduce . . . cost of service, resulting in reduced costs to shippers and ultimately customers.

UTU, 108 F.3d at 1431.

The Supreme Court has also recognized the circumstances in which adjustments need to be made. It has held that the ICC (now the STB) may abrogate some terms of collective bargaining agreements affecting transactions if abrogation is necessary to effectuate them. *See Norfolk*, 499 U.S. at 127-28. This principle has been interpreted to mean that "the modification is necessary in order to secure to the public some transportation benefit flowing from the underlying transaction . . . ." *RLEA*, 987 F.2d at 815. The D.C. Circuit has explained this requirement:

[T]he [agency] must find that the underlying transaction yields a transportation benefit to the public, "not merely [a] transfer [of] wealth from employees to their employer." [*RLEA*,] 987 F.2d at 815. In other words, the benefit cannot arise from the CBA modification itself; considered independently of the CBA, the transaction must yield enhanced efficiency, greater safety, or some other gain.

American Train Dispatchers Ass'n v. ICC, 26 F.3d 1157, 1164 (D.C. Cir. 1994) (*ATDA*), *abrogated on other grounds*, *Rio Grande Pipeline Co. v. Federal Energy Regulatory Comm'n*, 178 F.3d 533 (D.C. Cir. 1999). Further, there must be "a nexus between the changes sought and the effectuation of an [agency-]approved transaction." *UTU*, 108 F.3d at 1430.

In this case, the arbitrator, in determining whether there was a public transportation benefit requiring the modification of seniority status, stated that he was "convinced that the successful implementation of the 'hub and spoke' operation at Salina is an obvious public transportation benefit and that

considerations of efficiency of that operation warrant the modification and elimination of existing seniority rights as set forth in the proposed implementing agreement." Arbitration at 5. The arbitrator further found that the agreement "fairly and equitably blends the rights of the petitioners with those of other affected employees." *Id.* at 7. This was insufficient, the petitioners contend, either to satisfy the requirement that the modifications are necessary or to constitute a factual finding warranting deferential review by the STB.

The petitioners argue that the necessity requirement mandates that the STB and the arbitrator set forth sufficient facts to disclose the basis on which the finding of necessity was made. Thus, the petitioners argue that the case should be remanded for such specific findings. But they cite no authority imposing a requirement of greater specificity than is apparent here. The arbitrator explained the reason for his decision, and the STB does not review an arbitrator's factual determinations absent egregious error. To some extent, the existence of necessity is bolstered by procedural factors: the arbitrator held a full hearing and weighed the written and oral submissions of the parties. Absent clear error, the lack of a more detailed articulation of reasons is not enough to warrant disapproval by the STB under its lenient standard of review (although by so holding we do not intend to derogate the importance of an adequate statement of reasons). Under the *Lace Curtain* standard of review, fact-bound determinations such as the ones before us may not be overturned without a showing of egregious error. *See Lace Curtain*, 3 I.C.C.2d at 735; *see also ATDA*, 26 F.3d at 1163.

Finally, the STB concluded (and we agree) that *Volkman* supports the use of the petitioners' SSW hire date to determine their seniority status, because it was *Volkman* that first set the petitioners' hire date at the date of their hire by the SSW.[12]

IV.

The petitioners also, for reasons similar to their seniority objections, challenge the plan to change the location of their home terminal from Pratt, Kansas to Herington, Kansas. They argue that the arbitrator and the STB failed to adequately consider the consequences of sitting the home terminal at Herington, and that these decision-makers failed to explain why the employees' living arrangements had to be disrupted to make the merger possible. The petitioners concede that the STB stated that sitting the home terminal at Herington would produce public benefits--"efficiency gains, such as cost reductions and service improvements." As to the petitioners' claim that the unavailability of housing at the new site should be weighed against the public benefits of increased efficiency, the arbitrator held that the alleged burden was properly compensated for by moving allowances and other benefits provided to the petitioners under *New York Dock*.[13] The petitioners argue that the general factors cited by the arbitrator--that the move would improve "adequacy of transportation to the public," "efficiency gains," "cost reductions," and "service improvements"--are insufficient to show the benefits of the move. They also point out the fact that the original plan was to retain Pratt as the home terminal, and the STB now has failed to demonstrate why moving the terminal to Herington produces more efficiency gains. Again, they cite no authority requiring a more detailed statement of reasons by the arbitrator or by the STB.

Further, the STB notes that the petitioners have failed to show the advantage of sitting the home terminal at Pratt in preference to moving it to Herington; and there is nothing to undermine the arbitrator's finding that transportation benefits would result from the move. The arbitrator found that changing the location of the home terminal was "part and parcel of the hub and spoke operation . . . at Salina." And the record supports this finding. For example, a declaration

submitted by John M. Raaz, a Union Pacific assistant vice president, indicates that the location of the terminal at Herington would produce "additional flexibility gained by a single crew base protecting multiple directional operations from Herington" and would "provide[] the option of avoiding the major terminal of Kansas City in times of heavy congestion or flooding." Flexibility was made possible because the Herington base could support service in four directions: toward Pratt (west), Wichita (south), Kansas City (east), and Marysville, Kansas (north). The posture of the Herington base provided the flexibility to shift traffic from one route to another.

The Union Pacific also notes that the change in the location of the home terminal does not abrogate or modify any prior collective bargaining agreement, and, in fact, the Union Pacific has the right to change unilaterally the location of a home terminal. Even if the Union Pacific does not have such a right, the arbitrator's finding that the move was necessary for the merger is not erroneous.

Further, the petitioners argue, the arbitrator and STB failed to consider the lack of proper facilities in Herington for the employees who would be forced to move there. Specifically, they argue that Herington does not have adequate housing and other facilities for transferred workers. This is challenged by the Union Pacific's uncontested assertion that the majority of employees that were required to move to Herington were able to do so. In addition, the petitioners argue that the commuting distance from Pratt to Herington, 135 miles away, would be unacceptably long. Union Pacific notes that this factor is not a consideration the arbitrator was required to take into account. Even so, the petitioners do not deny that they continue to live and work in the Pratt area, and do not commute to Herington. In fact, they indicate that the arbitrator "allowed the Union Pacific to accommodate [trainmen who did not transfer to Herington] by allowing

those nine to 'not be required to commute to Herington for their assignments.'" Petitioners' Br. at 49. And, even if a lengthy commute had required the petitioners' relocation, the petitioners would have been entitled to moving allowances and other benefits under *New York Dock*.

V.

For the foregoing reasons, we AFFIRM.

FOOTNOTES

Click footnote number to return to corresponding location in the text.

[*] The Honorable Richard D. Cudahy, United States Circuit Judge for the Seventh Circuit, sitting by designation.

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[1] Section 204 of the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), transferred the ICC's railroad-related functions to the STB and directed that the STB apply ICC precedent.

[2] The Rock Island sought to reorganize in 1975 under the Bankruptcy Act. The plan for reorganization was rejected in 1980 by the bankruptcy court, and the court recommended that the trustee assigned to the matter commence liquidation. *See In re Rock Island*, No. 75 B 2697, Order No. 232 (N.D. Ill. 1980).

[3] The ICC approved that acquisition in *SSW-Purchase-Rock Island*, 363 I.C.C. 320 (1980).

[4] When two seniority systems are dovetailed with one another in a railroad combination, employees of the acquired line receive "carryover" seniority rights. This means that these employees may carry over in full their seniority rights from their old employer to their new one. However, it is

sometimes necessary that "acquired employees" carry over only a part of their seniority rights. *See Volkman v. UTU*, 724 F.Supp. 1282, 1288 (D. Kan. 1989), *rev'd on other grounds*, 73 F.3d 1047 (10th Cir. 1996).

[5]In order for railroads to merge their operations, they must first obtain regulatory approval from the STB. 49 U.S.C. § 11323-26. The STB will approve a proposed merger or consolidation only if it finds that the transaction is in the public interest. *See* 49 U.S.C. § 11324(c); *see also Norfolk & W. Ry. Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 132 (1991).

[6]*New York Dock* also requires the payment of certain "displacement allowances" to employees who are placed in a worse position with respect to compensation and rules governing their working conditions, *see* art. I, sections 1, 5, as well as "dismissal allowances" to employees who are deprived of employment as a result of a railroad transaction, *see* art. I, sections 1, 6. These benefits are available during a "protective period," which lasts for six years following displacement or dismissal. *See* art. I.

[7]The UTU is the labor union that represented the petitioners in the negotiations leading to the agreement, as well as other affected employees.

[8]Locating the "home terminal" at Herington meant that crews would be based in Herington.

[9]Under the UTU Constitution, the agreement could not be ratified without approval of all general chairpersons in the affected jurisdictions. The officer who objected to the agreement was the UTU associate general chairperson representing the former SSW employees.

[10]The language used in the STB decision and the briefs filed by the parties refers to the STB's action as "declin[ing] to

review" the arbitrator's decision. This is equivalent to accepting, in the absence of a showing of egregious error, the arbitrator's findings of fact and related conclusions. "Review" is used interchangeably with "overturn" in all the parties' pleadings. We will treat it similarly.

[11] Under the "hub and spoke" plan for implementation of the merger, the number of home terminals was to be reduced. The negotiating parties reasoned that the location of the home terminal in Herington, rather than Pratt, was the most efficient way of implementing the plan.

[12] The "prior rights" of which the petitioners in this case have been deprived--first preference to jobs at the location where they were first hired by the SSW--were not deemed inviolate by the *Volkman* court. The court noted that these "prior rights" were "subject to modification through future collective bargaining the same as are prior rights granted under existing labor contracts between the defendants SSW and UTU" and "[a]ny disputes regarding [petitioners'] prior rights and seniority shall be handled by the SSW and UTU through the grievance and arbitration procedures mandated by the Railway Labor Act and/or the Interstate Commerce Act." July 21, 1993 Final Judgment at 3, *reprinted in* Petitioners' App. at 95, 98.

[13] *The* New York Dock *conditions provide that employees adversely affected by operational changes following a merger or consolidation are entitled to certain benefits, including up to six years of salary protection in the event of a dismissal or displacement and relocation benefits if employees are required to change their place of employment.* See New York Dock, *360 I.C.C. 60, at art. I, secs. 5, 6 & 9.*

SURFACE TRANSPORTAION BOARD

DECISION

STB Finance Docket No. 32760 (Sub-No. 33)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND MISSIOURI PACIFIC RAILROAD COMPANY --- CONTROL AND MERGER --- SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAIWAY COMPANY, SPCSL CORP. AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

(Arbitration Review)

Decided: April 27, 2000
Service Date: May 1, 2000

We are denying a petition filed by Lyn Swonger and James Spaulding (petitioners) who are seeking review of an arbitration decision that had been issued by neutral referee William E. Fredenberger, Jr. On March 25, 1999. The arbitrator imposed an implementing agreement between Union Pacific Railroad company (UP) and the United Transportation Union (UTU) that permitted UP to create "the Salina Hub" in Salina, KS, and to relocate a home terminal from Pratt, KS, to Herington, KS.

BACKGROUND

We approved the common control and merger of the rail carrier controlled by the Southern Pacific Rail

Corporation (SP) in 1996.[1] In our decision, we imposed the employee protective conditions in New York Dock Rv. – Control – Brooklyn Eastern Dist. 360 I.C.C. 60 (1979) (New York Dock). The UP is the surviving rail carrier following the merger.

The operating plan submitted by the applicants in UP/SP indicated that UP intended to use a "hub and spoke" system to implement the merger, with one hub located at Salina. On June 4, 1198, UP gave notice to UTU, pursuant to Article 1, section 4 of New York Dock, that it intended to create the hub in Salina. UTU and UP then tentatively agreed on an implementing agreement for the Salina Hub. the tentative agreement provided with employees would be dovetailed into the seniority roster based upon their date of hire on the property at which they were last employed.

The UTU Associate General Chairperson representing employees of SP's subsidiary, the St. Louis Southwestern Railway Company (SSW) objected to the agreement. Employees who had been originally hired by the former Chicago, Rock Island and Pacific Railroad Company (RI) to work on the Tucumcari line, and who were then subsequently hired by SSW when it acquired the line, apparently did not agree with the hire dates that would be used to form the new seniority roster. The matter was then submitted to arbitration. In his decision, the arbitrator adopted the tentative agreement that UP and UTU had negotiated and authorized UP to close its terminal in Pratt and transfer the affected employees to Herrington.

On April 14, 1999, petitioners Swonger and Spaulding, who are members of UTU, appealed the

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[1] Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996) (UP/SP), aff's sub nom., Western Coal Traffic League v. STB, 169 F.3d 775 (D.C. Cir. 1999).

arbitrator's decision on behalf of themselves and all other trainmen who had been employed by the RI and SSW.[2] UP and UTU responded in opposition to the appeal on May 4, 1999.

ARGUMENTS OF THE PARTIES

Seniority. Swonger and Spaulding assert that the arbitrator improperly modified their seniority when he adopted the implementing agreement between UP and UTU for the Salina Hub. Under the implementing agreement, the petitioners' seniority is based on the date that they were hired by SSW when it acquired the Tucumcari line, which was March 24, 190. They claim that their seniority should be based on the date they were originally hired by the RI. They note that, in contrast, the agreement bases seniority dates for UP employees on their original dates of hire with UP. Petitioners allege further that the change in their seniority rights was not necessary to carry out the approved transaction.

Petitioners contend further that they have a contractual right to preserve their RI seniority under court orders entered in Jerry W. Volkman v. United Transportation Union, Case No. 83-6025-T (D. Kan. July 21, 1993 and Dec.

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[2] We will grant petitioners' request for leave to file a supplemental appendix that exceeds the 30-page limit established in 49 CFR 1115.2(d). The supplemental filing contains material that was submitted in the arbitration proceeding and is relevant to the issues raised in the appeal. We will, however, deny petitioners' request for oral argument. We can resolve the legal issues here without oral argument, as no issues have been presented that cannot be decided base do the written record. A request by petitioners to stay the effect of the arbitration decision pending a ruling on their petition to review the arbitration decision was denied in a decision served on April 30, 1999.

15, 1993) (Volkman).[3] Vollkman involved claims by former RI employees for benefits under a labor protection agreement dated March 4, 1980, which applied to the sale of former FI rail lines. According to petitioners, their court-sanctioned seniority rights should be preserved above and beyond rights under a collective bargaining agreement.

Petitioners assert further that paragraph 2 of the New York Dock conditions requires that their rights must be preserved "unless changed by future collective bargaining agreements or applicable statutes." Petitioners state that the arbitrator did not address whether their seniority rights should be preserved under applicable law. Nor, they claim, did he determine whether the specific changes were "necessary" for the transaction.

In its response, UP contends that the arbitrator did not violate the court's orders in Volkman for the Salina Hub. The carrier notes that the court, in Volkman, rejected a request by former RI employees for full "carryover" seniority and confirmed that the seniority date of former RI employees was March 24, 1980, the date they were hired by SSW. Volkman, 724 F. Supp. at 1335. UP points out further that the court's July 21, 1993 order provides that "those prior rights may be modified by future collective bargaining as are prior rights granted under the existing labor contracts between the defendants SSW and UTU." UP maintains that the petitioners' prior rights were modified through the process of collective bargaining, as had been contemplated by the court in Volkman.

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[3] The background of the dispute is discussed in Volkman v. United Transp. Union, 724 F. Supp. 1282 (D.Kan. 1998). The July 21, 1993 order was the court's final judgment on the claims. The court then issued an order on December 15, 1993, approving settlement agreement.

UP asserts that the arbitrator had explained that the "hub and spoke" operations at Salina would enable UP to achieve public transportation benefits and operating efficiencies and that modifying petitioners' seniority was necessary to implement the coordination. UP further notes that the implementing agreement modifies the prior rights of all employees in the Salina Hub, and that petitioners were treated no differently than any other employees.

In replying to the petitioners, UTU makes many of the same arguments as UP. The union adds that, for nearly 20 years, the former RI employees have used their 1980 seniority date with SSW. In UTU's view, to permit petitioners to resurrect their original RI seniority date now would be exceedingly unfair to the other employees involved in this and prior mergers. UTU asserts that the arbitrator found that the method agreed to by UTU and UP was a fair and equitable method of blending the rights of the former SSW and RI trainmen with those of the UP affected employees. UTU contends that petitioners have asserted no basis for the Board to disturb that finding.

Relocation of terminal. In their appeal, the petitioners contend that the UP has not demonstrated a public transportation benefit by relocating the Pratt terminal to Herington. They argue that the public, including affected employees, would not benefit by requiring trainmen to drive 135 miles to report to work. They assert that the employee fatigue factor is inconsistent with the public transportation benefit determined by the arbitrator.

UP says that the petitioners have not presented any evidence to support their claims of inadequate housing and public facilities at Herington. To the contrary, UP submitted letters from city officials in Herington, indicating there is more than an adequate supply of housing and pubic facilities

in and around Herington. UP states further that employees who did not believe that suitable housing or public facilities are available in Herington have the option of remaining in Pratt. [4] UP further notes that employees are accorded relocation benefits under the New York Dock.

The UTU states that the petitioners have not demonstrated that egregious error occurred to warrant review of the arbitrator's findings on the relocation of the Pratt terminal.

DISCUSSION AND CONCLUSIONS

Under 49 CFR 111.58, the standard for review of arbitration decisions is provided in Chicago & North Western Tptn. Co.,- Abandonment, 3 I.C.C. 2d 729 (1987), aff'd sub nom., International Broth. of Elec. Workers v. I.C.C., 862 F.2d 330 (D.C. Cir. 1988) (Lace Curtain). Under Lace Curtain, we accord deference to arbitrators' decisions and will not review "issues of causation, calculation of benefits, or the resolution of factual questions" in the absence of egregious error. Review of arbitral decisions has been limited to "recurring or otherwise significant issues of general importance regarding the interpretation of our labor conditions." We generally do not overturn an arbitral award, unless it is shown that the award is irrational or fails to draw its essence form the imposed labor conditions or its is outside the scope of authority or fails to draw its essence from the imposed labor conditions or its is outside the scope of authority granted by the conditions. Id. at 736.

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[4] UP states that, as early as November 1998, only nine employees elected to remain at Pratt, while 28 employees agreed to relocate to Herington. UP notes further that the employees who elected to remain in Pratt will not be required to commute to Herington for their assignments.

Swonger and Spaulding ask us to review the arbitrator's determination regarding the seniority roster at Salina. Typically, the Board defers to the arbitrator's determination on seniority matters. See Norfolk and Western Railway Company and New York, Chicago, and St. Louis Railroad Company – Merger, Etc., Finance Docket No. 21210 (Sub-No. 5) (STB served Dec. 22, 1998).

The arbitrator found that the seniority provisions in the implementing agreement fairly and equitably blended the rights of the petitioners with those of other affected employees, and that it was consistent with the court orders in Volkman. Petitioners have not demonstrated that the arbitrator's decision was irrational, that it exceeded his authority of that egregious error occurred warranting review under the Lace Curtain standard. To the contrary, Volkman supports the arbitrator's use of March 24, 1980, as the seniority date for the former RI employees.

The arbitrator determined that there were public transportation benefits from implementing the "hub and spoke: operations at Salina that warranted modifying the seniority rights of employees. There are factual findings to which we must accord deference to the arbitrator under the Lace Curtain standard of review. See Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company – Control and Merger – Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and the Denver and Rio Grande Western Railroad Company, STB Finance Docket No. 32760 (Sub-No. 22)(STB served June 26, 1997). Petitioners have failed to show that the arbitrator committed egregious error in making these findings. Therefore, we decline to review these findings.

Petitioners' claim that there is no public transportation benefit from relocating UP's terminal from Pratt to Herington also is without merit. In UP/SP, 1 S.T.B. at 362-64, we noted that, to meet the statutory requirement that the transaction be found to be consistent with the public interest, we had to examine the effect of the transaction on the adequacy of transportation to the public (see former 49 U.S.C. 1344(b)(1)(A) and current 49 U.S.C. 11324(b)(1). This, in turn, required us to determine the public benefits that would result from the transaction. We defined "public benefits" as efficiency gains, such as cost reductions and service improvements. We then determined that the applicants should realize public benefits of $534 million per year form more efficient operations. Id. at 376. Among the efficiencies specifically discussed were the streamlining and consolidation of transportation functions and operations as major terminals. Consequently, the arbitrator found that UP's "hub and spoke" operation at Salina is an obvious public transportation benefit.

Petitioners claim that the purported unavailability of housing and other non-transportation related facilities should have been weighed against the "public benefits" of the transaction. It is too late for petitioners to raise such issues. In any even these matters are properly compensated by moving allowances and other benefits under New York Dock. Thus, petitioners have not met our standard for review under Lace Curtain for these matters, as well.

Accordingly, we decline to review the arbitrator's decision.

This decision will not significantly affect either the quality of the human environment of the conservation of energy resources.

It is ordered:

1. Petitioner's request to exceed the page limitation in 49 CFR 1115.2(d) is granted. Petitioner's request for oral argument is denied.

2. We decline to review the arbitrator's decision.

3. This decision is effective on its date of service.

STB Finance Docket No. 32760 (Sub-No. 33)

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams, Secretary

ARBITRATION PURSUANT TO ARTICLE I, SECTION 4 OF THE NEW YORK DOCK CONDITIONS

PARTIES TO DISPUTE:

UNION PACIFIC RAILROAD COMPANY AND UNITED TRANSPORTAION UNION

HISTORY OF DISPUTE:

In Decision No. 44 served August 12, 1996 in Finance Docket No. 32760 the Surface Transportation Board (STB) approved the merger of the Union Pacific Corporation and its subsidiaries (UP) with the Southern Pacific Rail Corporation and its subsidiaries (SP) and control of UP over SP. The authority granted was made subject to the labor protective conditions set forth in New York Dock Ry. – Control – Brooklyn Eastern District Terminal, 360 ICC 60 (1979) (New York Docket Conditions).

On June 4, 1998, UP gave notice under Article I, Section 4 of the New York Dock Conditions to the General Chairman of three United Transportation Union (UTU) General Committees of Adjustment representing affected employees (Trainmen, i.e. Conductors, Foremen, Brakemen and Yardmen) of the Carrier's intent to implement that portion of the approved merger and control plan concerning creation of the Salina Hub in Salina, Kansas. Not particularized in the notice but clearly understood by the parties was that the Carrier would establish a new "spoke and hub" operation at Salina, as it had at a number of other locations, which would require modification or elimination of existing collective bargaining agreements (CBA's) including seniority provisions. The notice proposed a date for

negotiation of an agreement under Article I, Section 4 to implement the transaction.

Pursuant to Article I, Section 4, the parties conducted negotiations throughout the summer and early fall of 1998, eventually reaching what appeared to be a tentative agreement. However, while the proposal was being circulated for initialing by parties, the General Chairman of one General Committee raised objections to the handling of seniority under the proposal. Although the General Chairman's objections apparently were assuaged, he later raised additional objections which could not be resolved. The proposed implementing agreement never was circulated for ratification as had been anticipated.

On January 5, 1999 the Carrier invoked arbitration under Article I, Section 4. the parties selected the undersigned as Neutral Referee.

A hearing was held in this matter on February 23, 1999 in Dallas, Texas. Written submissions were filed, and the parties argued orally.

FINDINGS

After a thorough review of the record in this case the undersigned concludes that the issues raised by the parties are properly before the Neutral Referee for determination.

At the outset, it should be noted that a under Article I, Section 4 a Neutral Referee is charged in the responsibility of crafting a fair and equitable implementing arrangement which disposes of all outstanding issues between the parties whose negotiations for an implementing agreement have been unsuccessful. In so doing the Neutral Referee serves as a functionary of the STB and thus is bound by the relevant

pronouncement of that agency as well as its predecessor, the Interstate Commerce Commission (ICC). Also, a Neutral Referee may be guided by relevant decisions of other Neutral Referees rendered under Article I, Section 4. For a more detailed treatment of a Neutral Referee's authority and duties under Article I, Section 4 see Norfolk Southern Ry. Co., et.al. and Bro Maintenance of Way Employees. Jan. 14, 1999 (Fredenberger, Neutral Referee).

In the instant case the treatment of seniority under the proposed implementing agreement for certain groups of employees represented by the Organization has led to fundamental disagreements between the groups on the one hand and the Carrier and the Organization on the other. this also led to the ultimate failure of all parties to agree to the proposed implementing agreement.

In order to understand the seniority dispute in this case it is necessary to review briefly the relevant historical treatment of the seniority of the dissenting employee groups. In 1980 the St. Louis Southwestern Railway Co., (SSW), a subsidiary of SP, purchased from the Chicago, Rock Island & Pacific Railroad (Rock Island) a rail line known as the Tucumcari Line. The SSW took into its employment many former Rock Island employees who had worked on the Tucumcari Line. Their hire date by the SSW was March 24, 1980 and that became their seniority date. However they also which given point seniority on the Tucumcari Line with prior rights at such points, one of which was Salina, Kansas. Thus, the former Rock Island employees came ahead of any SSW employees who had system seniority with their date of hire as their seniority date, for any work at the points on the Tucumcari Line were the former Rock Island employees had prior rights. With respect to such points SSW employees were given a seniority date later than March 24, 1980.

The proposed implementing agreement negotiated by the parties contains provisions for seniority consolidation not only for former SSW and Rock Island employees but also of other former SP and UP employees affected by the transaction. The proposal provides for creation of a master seniority roster, for the dovetailing of seniority of all affected employees to establish the roster, for the creation of three seniority zones within the roster, for the maintenance of existing prior rights in Zone 1, and for the creation of prior rights in Zones 2 and 3. The Zone 3 covers the former SSW territory including the Tucumcari Line.

The following provisions of the proposed implementing agreement appear to the cause of the seniority dispute in this case:

ARTICLE II – SENIORITY CONSOLIDATIONS

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D. Entitlement to assignment on prior rights Zones 2 and 3 and to the master roster shall be by seniority order canvass of the employees holding seniority in the territory, subject to roster sizing limits. Prior to the roster formulation process, the Organization and the Carrier shall reach agreement upon the total number of employees assigned to the expended Salina Hub master seniority roster.

E. With the creation of the new seniority district described herein, all previous seniority outside the Salina Hub held by trainmen on the new roster shall be eliminated and all seniority inside the new hub held by the trainmen outside the district shall be eliminated. All preexisting prior rights, top and bottom, or any other such seniority arrangements in existence prior to formulation of

the Salina Hub, if any, are of no further force or effect and the provisions of this Article shall prevail in lieu of thereof.

***

The former Rock Island employees, appearing through counsel in both a written submission an oral argument at the hearing on February 23, 1999, argue that their treatment under the seniority provisions of the proposed implementing agreement is not fair and equitable because it abrogates seniority rights they enjoyed under previous agreements. The former SSW employees complain that their former system seniority date is not being utilized thereby depriving them of important seniority rights. They too allege that the proposed implementing agreement is not fair and equitable to them.

The dissenting employees contest that there is a public transportation benefit in this case necessitating the alteration of seniority rights as contemplated by the proposed implementing agreement. However, after thoroughly reviewing the record in this case, the undersigned is convinced that the successful implementation of the "hub and spoke" operation at Salina is an obvious public transportation benefit and that considerations of efficiency of that operation warrant the modification and elimination of existing seniority rights as set forth in the proposed implementing agreement. Other hub and spoke operations instituted by the Carrier at Salt Lake Cit, Utah and Denver, Colorado were the subject of arbitration pursuant to Article I, Section 4 involving the same parties. UTU and UPRR Co., Apr. 14, 1997 (Yost, Neutral Referee). Referee Yost found the seniority consolidations proposed by the Carrier necessary to accomplish the transaction and to yield enhanced efficiency of operations benefiting the general public and employees of the merged Carriers. While the factual situation before Referee Yost

may not be identical to the one in this case, the similarity between the seniority rights and changes in those rights involved in that case and the instant case persuades the undersigned that the same finding should obtain here. The undersigned notes that Referee Yost's Decision was reviewed and sustained by the STB in Finance Docket No. 32760 (Sub. No. 22), June 26, 1997.

It should be borne in mind that the proposed implementing agreement at issue here reflects the genuine efforts of the Carrier and various group of affected employees to implement the STB authorized transaction in a manner serving the interests of all involved. The proposal reflects the give and take characteristics of the process of collective bargaining. That process more often than not results in the modification, and even the elimination, of rights protected by existing CBAs. Seniority is among such rights. Assuming demonstration of the requisite public transportation benefit, which this Neutral Referee has found to exist with respect to the Salina Hub transaction, seniority rights may be modified or even eliminated. Such is the situation in the instant case.

Accordingly, the undersigned cannot conclude that there is anything unfair to former SSW or Rock Island Trainmen in the seniority provisions of the proposed implementing agreement. Rather, the undersigned believes that the proposal represents a fair and equitable method of blending the rights of those employees with those of other Carrier affected employees.

The undersigned also is aware that certain former Rock Island employees at hub and spoke operations other than Salina have obtained rulings from the United States District Court for the District of Kansas establishing seniority rights for such employees seemingly inconsistent with the

seniority provisions as proposed implementing agreement and that the former Rock Island employees involved in the Salina Hub transaction have taken the position that they are entitled to the same rights granted by the Court. However, the Court's Decisions and Orders specifically provide that the seniority rights granted the former Rock Island employees are subject to modification through future collective bargaining and that any disputes concerning those rights are to be handled through the grievance and arbitration procedures mandated by the Railway Labor Act and/or the Interstate Commerce Act. The Court's reference to the Interstate Commerce Act is construed by the undersigned to contemplate an Article I, Section 4 proceeding. Accordingly, to the extent the Court's Decisions and Order may have application to the former Rock Island employees involved in this case the undersigned does not find the Court's Decisions and Orders have insulated the existing seniority rights of those employees against change through Article I, Section 4, of the New York Dock Conditions.

The former Rock Island employees also argue that the closure of the terminal in Platt, Kansas and its relocation to Harrington, Kansas contemplated by the Carrier as part of the transaction in this case is improper. The employees argue that no public transportation benefit can be shown to offset the damage that will be done when employees will be required to relocate to towns that have inadequate housing and public facilities.

The Carrier maintains that it has the authority under existing CBAs to move the terminal as planned. Nevertheless, urges the Carrier, a movement of the terminal is an integral part of the implementation of the hub and spoke operation at Salina and thus will promote the efficiency of that operation which is a public transportation benefit.

Whatever the Carrier's rights under existing CBAs, the undersigned is convinced that relocation of the terminal is part and parcel of the hub and spoke operation to be implemented at Salina. Accordingly, the public transportation benefit is demonstrated. Additionally, it does not appeal that the new points at which the employees would have to report for work are beyond a reasonable driving distance from their present locations. Accordingly, the undersigned does not find merit to the employees' argument.

In view of the foregoing, attached hereto and made a part hereof is the proposed implementing agreement negotiated by the parties which will constitute the arbitrated implementing arrangement in this case the purpose of which is to resolve all outstanding issues and disputes raised by the parties in this proceeding.

DATED: March 25, 1999

William E. Fredenberger, Jr. Neutral Referee

STATUTORY PROVISIONS INVOLVED

49 U.S.C. §11321 formerly known as 49 U.S.C. § 11341

(a) The authority of the Board under this subchapter is exclusive. A rail carrier or corporation participating in or resulting from a transaction approved by or exempted by the Board under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

(b) A power granted under this subchapter to a carrier or corporation is in addition to and changes its powers under its corporate charter and under State law. Action under this subchapter does not establish or provide for establishing a corporation under the laws of the United States.

49 U.S.C. § 11326 formerly known as 49 U.S.C. § 11347

(a) Except as otherwise provided in this section, when approval is sought for a transaction under sections 11324 and 11325 of this title, the Board shall require the rail carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under section 5(2)(f) of the Interstate Commerce Act before February 5, 1976, and the terms established under section 24706(c) of this title. Notwithstanding this part, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Board (or if an employee was employed for a lesser period of time by the rail carrier before the action became effective, for that lesser period).

(b) When approval is sought under sections 11324 and 11325 for a transaction involving one Class II and one or more Class III rail carriers, there shall be an arrangement as required under subsection (a) of this section, except that such arrangement shall be limited to one year of severance pay, which shall not exceed the amount of earnings from the railroad employment of that employee during the 12-month period immediately preceding the date on which the application for approval of such transaction is filed with the Board. The amount of such severance pay shall be reduced by the amount of earnings from railroad employment of that employee with the acquiring carrier during the 12- month period immediately following the effective date of the transaction. The parties may agree to terms other than as provided in this subsection.

(c) When approval is sought under sections 11324 and 11325 for a transaction involving only Class III rail carriers, this section shall not apply.

UNITED STATES CODE ANNOTATED
TITLE 45. RAILROADS
CHAPTER 14--RAIL PASSENGER SERVICE
[REPEALED OR OMITTED]
SUBCHAPTER IV--PROVISION OF RAIL PASSENGER SERVICES

§ § 565, 566. Repealed. Pub.L. 103-272, § 7(b), July 5, 1994, 108 Stat. 1379

HISTORICAL AND STATUTORY NOTES

Section 565, Pub.L. 91-518, Title IV, § 405, Oct. 30, 1970, 84 Stat. 1337; Pub.L. 92-316, § § 7, 8, June 22, 1972, 86 Stat. 230; Pub.L. 96- 73, Title I, § 120(a), Sept. 29, 1979, 93 Stat. 547; Pub.L. 97-35, Title XI, § § 1177(b), 1184, 1188(d), Aug. 13, 1981, 95 Stat. 692, 697, 699; Pub.L. 99-272, Title IV, § 4016, Apr. 7, 1986, 100 Stat. 110, related to protective arrangements for employees. See sections 24307, 24312, and 24706 of revised Title 49, Transportation.

Section 566, Pub.L. 91-518, Title IV, § 406, as added Pub.L. 96-73, Title I, § 121, Sept. 29, 1979, 93 Stat. 548, related to retention and maintenance of facilities. See section 24309 of revised Title 49, Transportation.

UNITED STATES CODE ANNOTATED
TITLE 49. TRANSPORTATION
SUBTITLE V--RAIL PROGRAMS
PART C--PASSENGER TRANSPORTATION
CHAPTER 247--AMTRAK ROUTE SYSTEM

§ 24706. Discontinuance

(a) Notice of discontinuance.--(1) Except as provided in subsection (b) of this section, at least 180 days before a discontinuance under section 24704 or or [FN1] discontinuing service over a route, Amtrak shall give notice of the discontinuance in the way Amtrak decides will give a State, a regional or local authority, or another person the opportunity to agree to share or assume the cost of any part of the train, route, or service to be discontinued.

(2) Notice of the discontinuance under section 24704 or paragraph (1) shall be posted in all stations served by the train to be discontinued at least 14 days before the discontinuance.

(b) Discontinuance for lack of appropriations.--(1) Amtrak may discontinue service under section 24704 or subsection (a)(1) during--

(A) the first month of a fiscal year if the authorization of appropriations and the appropriations for Amtrak are not enacted at least 90 days before the beginning of the fiscal year; and

(B) the 30 days following enactment of an appropriation for Amtrak or a rescission of an appropriation.

(2) Amtrak shall notify each affected State or regional or local transportation authority of a discontinuance under this

subsection as soon as possible after Amtrak decides to discontinue the service.

[(c) Repealed. Pub.L. 105-134, Title I, § 142(a), Dec. 2, 1997, 111 Stat. 2576]

UNITED STATES CODE ANNOTATED
TITLE 49. TRANSPORTATION
SUBTITLE III--GENERAL AND INTERMODAL PROGRAMS

§5333. Labor standards

(a) Prevailing wages requirement.--The Secretary of Transportation shall ensure that laborers and mechanics employed by contractors and subcontractors in construction work financed with a grant or loan under this chapter be paid wages not less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor under the Act of March 3, 1931 (known as the Davis-Bacon Act) (40 U.S.C. 276a--276a-5). The Secretary of Transportation may approve a grant or loan only after being assured that required labor standards will be maintained on the construction work. For a labor standard under this subsection, the Secretary of Labor has the same duties and powers stated in Reorganization Plan No. 14 of 1950 (eff. May 24, 1950, 64 Stat. 1267) and section 2 of the Act of June 13, 1934 (40 U.S.C. 276c).

(b) Employee protective arrangements.--(1) As a condition of financial assistance under sections 5307-5312, 5318(d), 5323(a)(1), (b), (d), and (e), 5328, 5337, and 5338(b) of this title, the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable. The agreement granting the assistance under sections 5307-5312, 5318(d), 5323(a)(1), (b), (d), and (e), 5328, 5337, and 5338(b) shall specify the arrangements.

(2) Arrangements under this subsection shall include provisions that may be necessary for--

(A) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;

(B) the continuation of collective bargaining rights;

(C) the protection of individual employees against a worsening of their positions related to employment;

(D) assurances of employment to employees of acquired mass transportation systems;

(E) assurances of priority of reemployment of employees whose employment is ended or who are laid off; and

(F) paid training or retraining programs.

(3) Arrangements under this subsection shall provide benefits at least equal to benefits established under section 11326 of this title.

REPEAL OF 49 U.S.C. § 24706

SELECTED PORTIONS of: PL 105-134, December 2, 1997, 111 Stat 2570

Sec. 1(a)

(a) SHORT TITLE.--This Act may be cited as the "Amtrak Reform and Accountability Act of 1997".

* * * * * *

SUBTITLE C - EMPLOYEE PROTECTION REFORMS

Sec. 141. Railway Labor Act Procedures

* * * * * *

(e) NO PRECEDENT FOR FREIGHT. - Nothing in this Act, or in any amendment made by this Act, shall affect the level of protection provided to freight railroad employees and mass transportation employees as it existed on the day before the date of enactment of this Act.

Sec. 142. Service Discontinuance

(a) REPEAL.--Section 24706(c) is repealed.

(b) EXISTING CONTRACTS.--Any provision of a contract entered into before the date of the enactment of this Act between Amtrak and a labor organization representing Amtrak employees relating to employee protective arrangements and severance benefits applicable to employees of Amtrak is extinguished, including all provisions of Appendix C-2 to the National Railroad Passenger Corporation Agreement, signed July 5, 1973.

(c) SPECIAL EFFECTIVE DATE.--Subsections (a) and (b) of this section shall take effect 180 days after the date of the enactment of this Act.

NEW YORK DOCK CONDITIONS - APPENDIX III

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 et seq. [formerly sections 5(2) and 5(3) of the Interstate Commerce Act], except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

1. Definitions. -- (a) "Transaction" means any action taken pursuant to authorizations of this Commission [*60] on which these provisions have been imposed.

(b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in [*61]

accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both this appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does [*62] not so elect; provided further, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

4. Notice and agreement of decision. -- (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of

any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior [*63] to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five [*64] (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

5. Displacement allowances. -- (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during the protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation [*65] received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such

allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position [*66] he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal of justifiable cause.

6. Dismissal allowances. -- (a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in

which he earned compensation prior to the date he is first [*67] deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with the railroad shall cease while he is so re-employed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earnings of such employee in employment other than with the railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return [*68] to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement.

7. Separation allowance. -- A dismissed employee entitled to protection under this appendix, may, at his option within 7

days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

8. Fringe benefits. -- No employee of the railroad who is affected by a transaction shall be deprived, during his protection period, of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad, in active or on furlough as the case may be, to the extent that such benefits can be so maintained under present [*69] authority of law or corporate action or through future authorization which may be obtained.

9. Moving expenses. -- Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects for the traveling expenses of himself and members of his family, including living expenses for himself and his family and for his own actual wage loss, not to exceed 3 working days, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for reasonable time thereafter and the ways and means of transportation to be agreed upon in advance by the railroad and the affected employee or his representatives; provided, however, that changes in place of residence which are not a result of the transaction, shall not be considered to be within the purview of this section; provided further, that the railroad shall, to the same extent provided [*70] above, assume the expenses, et cetera, for any employee furloughed with three

(3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provision of this section unless such claim is presented to railroad within 90 days after the date on which the expenses were incurred.

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. Arbitration of disputes. -- (a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controvesy with respect to the interpretation, application or enforcement of any provision of this appendix, except sections 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute [*71] or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to selects its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failure such

agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad [*72] will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. Losses from home removal. -- (a) The following, conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to receive dismissal allowance) who is required to change the point of his employment [*73] within his protective period as a result of the transaction and is therefore required to move his place of residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee is under a contract to purchase his home, the railroad shall protect him against loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(iii) If the employee holds an un-expired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are not the result of a transaction shall not be [*74] considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or their representatives and the railroad. In the event they are unable to agree, the dispute or controversy

may be referred by either party to a board of competent real estate appraisers, selected in the following manner. One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a [*75] third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position comparable to that which he held when his employment was terminated or he was furloughed, even though in a different craft or class, on the railroad which he is, or by training or retraining physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training of retraining is requested by such employee, the railroad shall provide for such training or retraining at no cost to the employee.

3. If such a terminated or furloughed employee who [*76] had made a request under section 1 or 2 of the article II fails

without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Subject to this appendix, as if employees of railroad, shall be employees, if affected by a transaction, of separately incorporated terminal companies which are owned (in whole or in part) or used by railroad and employees of any other enterprises within the definition of common carrier by railroad in section 1(3) of part I of the Interstate Commerce Act, as amended, in which railroad has an interest, to which railroad provides facilities, or with which railroad contracts for use of facilities, or the facilities of which railroad otherwise uses; except that the provisions of this appendix shall be suspended with respect to each such employee until and unless he applies for employment with each owning carrier and each using carrier; provided that said carriers shall establish [*77] one convenient central location for each terminal or other enterprises for receipt of one such application which will be effective as to all said carriers and railroad shall notify such employees of this requirement and of the location for receipt of the application. Such employees shall not be entitled to any of the benefits of this appendix in the case of failure, without good cause, to accept comparable employment, which does not require a change in place of residence, under the same conditions as apply to other employees under this appendix, with any carrier for which application for employment has been made in accordance with this section.

ARTICLE IV

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party [*78] may refer the dispute to arbitration.

ARTICLE V

1. It is the intent of this appendix to provide employee protections which are not less than the benefits established under 49 U.S.C. 11347 before February 5, 1976, and under section 565 of title 45. In so doing, changes in wording and organization from arrangements earlier developed under those sections have been necessary to make such benefits applicable to transactions as defined in article I of this appendix. In making such changes, it is not the intent to this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established under 49 U.S.C. 11347 before February 5, 1976 and under section 565 of title 45.

2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected.

AGREEMENT PURSUANT TO SECTION 13(c) OF THE URBAN MASS TRANSPORTATION ACT OF 1964, AS AMENDED

WHEREAS, the Congress recognized in the National Mass Transportation Assistance Act of 1974 that the urban mass transportation industry required operating assistance to maintain service to the public, stimulate ridership and assist communities in meeting their overall development aims; and

WHEREAS, Sections 3(e)(4), 5(n)(1) and 13(c) of the Act require, as a condition of any such assistance, that suitable fair and equitable arrangements be made to protect urban mass transportation industry employees affected by such assistance; and

WHEREAS, the fundamental purpose and scope of this agreement is to establish such fair and equitable employee protective arrangements on a national and uniform basis for application throughout the urban mass transportation industry to those employees and employees represented by the labor organizations signatory hereto; and

WHEREAS, the undersigned American Public Transportation Association and the national labor organizations signatory hereto have agreed upon the following arrangements as fair and equitable for application to any urban mass transportation employer ("Recipient") who is a signatory hereto and who has been designated to receive federal operating assistance under the Urban Mass Transportation Act of 1964, as amended ("Act");

NOW, THEREFORE, it is agreed that the following terms and conditions shall apply and shall be specified in any contract governing such federal assistance to the Recipient:

(1) The term "Project", as used in this agreement, shall not be limited to the particular facility, service, or operation assisted by federal funds, but shall include any changes, whether organizational, operational, technological, or otherwise, which are a result of the assistance provided. The phrase "as a result of the Project" shall, when used in this agreement, include events occurring in anticipation of, during, and subsequent to the Project and any program of efficiencies or economies related thereto; provided, however, that volume rises and falls of business, or changes in volume and character of employment brought about by causes other than the Project (including any economies or efficiencies unrelated to the Project) are not within the purview of this agreement.

(2) The Project, as defined in paragraph (1) shall be performed and carried out in full compliance with the protective conditions described herein.

(3) All rights, privileges, and benefits (including pension rights and benefits) of employees covered by this agreement (including employees having already retired) under existing collective bargaining agreements or otherwise, or under any revision or renewal thereof, shall be preserved and continued; provided, however, that such rights, privileges and benefits which are not foreclosed from further bargaining under applicable law or contract may be modified by collective bargaining and agreement by the Recipient and the union involved to substitute other rights, privileges and benefits. Unless otherwise provided, nothing in this agreement shall be deemed to restrict any rights the Recipient may otherwise have to direct the working forces and manage

its business as it deems best, in accordance with the applicable collective bargaining agreement.

(4) The collective bargaining rights of employees covered by this agreement, including the right to arbitrate labor disputes and to maintain union security and checkoff arrangements, as provided by applicable laws, policies and/or existing collective bargaining agreements, shall be preserved and continued. [NOTE: As an addendum to this agreement, there shall be attached where applicable the arbitration or other dispute settlement procedures or arrangements provided for in the existing collective bargaining agreements or any other existing agreements between the Recipient and the Union, subject to any changes in such agreements as may be agreed upon or determined by interest arbitration proceedings.] Provided, however, that this provision shall not be interpreted so as to require the Recipient to retain any such rights which exist by virtue of a collective bargaining agreement after such agreement is no longer in effect.

The Recipient agrees that it will bargain collectively with the union or otherwise arrange for the continuation of collective bargaining, and that it will enter into agreement with the union or arrange for such agreements to be entered into, relative to all subjects which are or may be proper subjects of collective bargaining. If, at any time, applicable law or contracts permit or grant to employees covered by this agreement the right to utilize any economic measures, nothing in this agreement shall be deemed to foreclose the exercise of such right.

(5)(a) In the event the Recipient contemplates any change in the organization or operation of its system which may result in the dismissal or displacement of employees, or rearrangement of the working forces covered by this agreement, as a result of the Project, the Recipient shall do so only in accordance with the provisions of subparagraph (b)

hereof. Provided, however, that changes which are not a result of the Project, but which grow out of the normal exercise of seniority rights occasioned by seasonal or other normal schedule changes and regular picking procedures under the applicable collective bargaining agreement, shall not be considered within the purview of this paragraph.

(b) The Recipient shall give to the unions representing the employees affected thereby, at least sixty (60) days' written notice of each proposed change, which may result in the dismissal or displacement of such employees or rearrangement of the working forces as a result of the Project, by sending certified mail notice to the union representatives of such employees. Such notice shall contain a full and adequate statement of the proposed changes, including an estimate of the number of employees affected by the intended changes, and the number and classifications of any jobs in the Recipient's employment available to be filled by such affected employees.

At the request of either the Recipient or the representatives of the affected employees, negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this agreement shall commence immediately. These negotiations shall include determining the selection of forces from among the employees of other urban mass transportation employers who may be affected as a result of the Project, to establish which such employees shall be offered employment with the Recipient for which they are qualified or can be trained; not, however, in contravention of collective bargaining agreements relating thereto. If no agreement is reached within twenty (20) days from the commencement of negotiations, any party to the dispute may submit it to arbitration in accordance with the procedures contained in paragraph (15) hereof. In any such arbitration, final decision must be reached within sixty (60) days after selection or

appointment of the neutral arbitrator. In any such arbitration, the terms of this agreement are to be interpreted and applied in favor of providing employee projections and benefits no less than those established pursuant to §5(2)(f) of the Interstate Commerce Act.

(6)(a) Whenever an employee, retained in service, recalled to service, or employed by the Recipient pursuant to paragraphs (5), (7)(e), or (18) hereof is placed in a worse position with respect to compensation as a result of the Project, he shall be considered a "displaced employee", and shall be paid a monthly "displacement allowance" to be determined in accordance with this paragraph. Said displacement allowance shall be paid each displaced employee during the protective period following the so long as the employee is unable, in the exercise of his seniority rights, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, adjusted to reflect subsequent general wage adjustments, including cost of living adjustments where provided for.

(b) The displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee, including vacation allowances and monthly compensation guarantees, and his total time paid for during the last twelve (12) months in which he performed compensated service more than fifty per centum of each such months, based upon his normal work schedule, immediately preceding the date of his displacement as a result of the Project, and by dividing separately the total compensation and the total time paid for by twelve, thereby producing the average monthly compensation and the average monthly time paid for. Such allowance shall be adjusted to reflect subsequent general wage adjustments, including cost of living adjustments where provided for. If the displaced employee's compensation in his current position is less in any

month during his protective period than the aforesaid average compensation (adjusted to reflect subsequent general wage adjustments, including cost of living adjustments where provided for), he shall be paid the difference, less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time, but he shall be compensated in addition thereto at the rate of the current position for any time worked in excess of the average monthly time paid for. If a displaced employee fails to exercise his seniority rights to secure another position to which he is entitle under the then existing collective bargaining agreement, and which carriers a wage rate and compensation exceeding that of the position which he elects to retain, he shall thereafter be treated, for the purposes of this paragraph, as occupying the position he elects to decline.

(c) The dispalcement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for cause in accordance with any labor agreement applicable to his employment.

(7)(a) Whenever any employee is laid off or otherwise deprived of employment as a result of the Project, in accordance with any collective bargaining agreement applicable to his employment, he shall be considered a "dismissed employee" and shall be paid a monthly dismissal allowance to be determined in accordance with this paragraph. Said dismissal allowance shall first be paid each dismissed employee on the thirtieth (30th) day following the day on which he is "dismissed" and shall continue during the protective period, as follows:

Employee's length of service prior to adverse effect	Period of protection

1 day to 6years	equivalent period
6 years or more	6 years

The monthly dismissal allowance shall be equivalent to one-twelfth (1/12th) of the total compensation received by him in the last twelve (12) months of his employment in which he performed compensation service more than fifty per centum of each such months based on his normal work schedule to the date on which he was first deprived of employment as a result of the Project. Such allowance shall be adjusted to reflect subsequent general wage adjustments, including cost of living adjustments where provided for.

(b) An employee shall be regarded as deprived of employment and entitled to a dismissal allowance when the position he holds is abolished as a result of the Project, or when the position he holds is not abolished but he loses that position as a result of the exercise of seniority rights by an employee whose position is abolished as a result of the Project or as a result of the exercise of seniority rights by other employees brought about as a result of the Project, and he is unable to obtain another position, either by the exercise of his seniority rights, or through the Recipient, in accordance with subparagraph (e). In the absence of proper notice followed by an agreement or decision pursuant to paragraph (5) hereof, no employee who has been deprived of employment as a result of the Project shall be required to exercise his seniority rights to secure another position in order to qualify for a dismissal allowance hereunder.

(c) Each employee receiving a dismissal allowance shall keep the Recipient informed as to his current address and the current name and address of any other person by whom he may be regularly employed, or if he is self-employed.

(d) The dismissal allowance shall be paid to the regularly assigned incumbent of the position abolished. If the position of an employee is abolished when he is absent from service, he will be entitled to the dismissal allowance when he is available for service. The employee temporarily filling said position at the time it was abolished will be given a dismissal allowance on the basis of that position, until the regular employee is available for service, and thereafter shall revert to his previous status and will be given the protections of the agreement in said position, if any are due him.

(e) An employee receiving a dismissal allowance shall be subject to call to return to service by his former employer after being notified in accordance with the terms of the then-existing collective bargaining agreement. Prior to such call to return to work by his employer, he may be required by the Recipient to accept reasonably comparable employment for which he is physically and mentally qualified, or for which he can become qualified after a reasonable training or retraining period, provided it does not require a change in residence or infringe upon the employment rights of other employees under then-existing collective bargaining agreements.

(f) When an employee who is receiving a dismissal allowance again commences employment in accordance with subparagraph (e) above, said allowance shall cease while he is so reemployed, and the period of time during which he is so reemployed shall be deducted from the total period for which he is entitled to receive a dismissal allowance. During the time of such reemployment, he shall be entitled to the protections of this agreement to the extent they are applicable.

(g) The dismissal allowance of any employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings from such other employment or

self-employment, any benefits received from any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his union representative, and the Recipient shall agree upon a procedure by which the Recipient shall be kept currently informed of the earnings of such employee in employment other than with his former employer, including self-employment, and the benefits received.

(h) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the failure of the employee without good cause to return to service in accordance with the applicable labor agreement, or to accept employment as provided under subparagraph (e) above, or in the event of his resignation, death, retirement, or dismissal for cause in accordance with any labor agreement applicable to his employment.

(I) A dismissed employee receiving a dismissal allowance shall actively seek and not refuse other reasonably comparable employment offered him for which he is physically and mentally qualified and does not require a change in his place of residence. Failure of the dismissed employee to comply with this obligation shall be grounds for discontinuance of his allowance; provided that said dismissal allowance shall not be discontinued until final determination is made either by agreement between the Recipient and the employee or his representative, or by final arbitration decision rendered in accordance with paragraph (15) of this agreement that such employee did not comply with this obligation.

(8) In determining length of service of a displaced or dismissed employee for purposes of this agreement, such employee shall be given full service credits in accordance with the records and labor agreements applicable to him and

he shall be given additional service credits for each month in which he receives a dismissal or displacement allowance as if he were continuing to perform services in his former position.

(9) No employee shall be entitled to either a displacement or dismissal allowance under paragraphs (6) or (7) hereof because of the abolishment of a position to which, at some future time, he could have bid, been transferred, or promoted.

(10) No employee receiving a dismissal or displacement allowance shall be deprived, during his protected period, of any rights, privileges, or benefits attaching to his employment, including, without limitation, group life insurance, hospitalization and medical care, free transportation for himself and his family, sick leave, continued status and participation under any disability or retirement program, and such other employee benefits as Railroad Retirement, Social Security, Workmen's Compensation, and unemployment compensation, as well as any other benefits to which he may be entitled under the same conditions and so long as such benefits continue to be accorded to other employees of the bargaining unit, in active service or furloughed as the case may be.

(11)(a) Any employee covered by this agreement who is retained in the service of his employer, or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment in order to retain or secure active employment with the Recipient in accordance with this agreement, and who is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects, for the traveling expenses for himself and members of his immediate family, including living expenses for himself and his immediate family, and for his

own actual wage loss during the time necessary for such transfer and for a reasonable time thereafter, not to exceed five (5) working days. The exact extent of the responsibility of the Recipient under this paragraph, and the ways and means of transportation, shall be agreed upon in advance between the Recipient and the affected employee or his representatives.

(b) If any such employee is laid off within three (3) years after changing his point of employment in accordance with paragraph (a) hereof, and elects to move his place of residence back to his original point of employment, the Recipient shall assume the expenses, losses and costs of moving to the same extent provided in subparagraph (a) of this paragraph (11) and paragraph (12)(a) hereof.

(c) No claim for reimbursement shall be paid under the provisions of this paragraph unless such claim is presented to the Recipient within ninety (90) days after the date on which the expenses were incurred.

(d) Except as otherwise provided in subparagraph (b), changes in place of residence, subsequent to the initial changes as a result of the Project, which are not a result of the Project but grow out of the normal exercise of seniority rights, shall not be considered within the purview of this paragraph.

(12)(a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the employer (or who is later restored to service after being entitled to receive a dismissal allowance), who is required to change the point of his employment as a result of the Project, and is thereby required to move his place of residence.

If the employee owns his own home in the locality from which he is required to move, he shall, at his option, be reimbursed by the Recipient for any loss suffered in the sale of his home for less than its fair market value, plus conventional fees and closing costs, such loss to be paid within thirty (30) days of settlement or closing on the sale of the home. In each case, the fair market value of the home in question shall be determined, as of a date sufficiently prior to the date of the Project, so as to be unaffected thereby. The Recipient shall, in each instance, be afforded an opportunity to purchase the home at such fair market value before it is sold by the employee to any other person and to reimburse the seller for his conventional fees and closing costs.

If the employee is under a contract to purchase his home, the Recipient shall protect him against loss under such contract, and in addition, shall relieve him from any further obligation thereunder.

If the employee holds an unexpired lease of a dwelling occupied by him as his home, the Recipient shall protect him from all loss and cost in securing the cancellation of said lease.

(b) No claim for loss shall be paid under the provisions of this paragraph unless such claim is presented to the Recipient within one year after the effective date of the change in residence.

(c) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through a joint conference between the employee, or his union, and the Recipient. In the event they are unable to agree, the dispute or controversy may be referred by the Recipient or the union to a board of

competent real estate appraisers selected in the following manner: one (1) to be selected by the representatives of the employee, and one (1) by the Recipient, and these two, if unable to agree within thirty (30) days upon the valuation, shall endeavor by agreement with ten (10) days thereafter to select a third appraiser or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the State and local Board of Real Estate Commissioners to designate within ten (10) days a third appraiser, whose designation will be binding upon the parties and who jurisdiction shall be limited to determination of the issues raised in this paragraph only. A decision of a majority of the appraisers shall be required and said decision shall be final, binding, and conclusive. The compensation and expenses of the neutral appraiser including expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

(d) Except as otherwise provided in paragraph (11)(b) hereof, changes in place of residence, subsequent to the initial changes as a result of the Project, which are not a result of the Project but grow out of the normal exercise of seniority rights, shall not be considered within the purview of this paragraph.

(e) "Change in residence" means transfer to a work location which is either (A) outside a radius of twenty (20) miles of the employee's former work location and farther from his residence than was his former work location, or (B) is more than thirty (30) normal highway route miles from his residence and also farther from his residence than was his former work location.

(13) A dismissed employee entitled to protection under this agreement may, at his option within twenty-one (21)

days of his dismissal, resign and (in lieu of all other benefits and protections provided in this agreement) accept a lump sum payment computed in accordance with section (9) of the Washington Job Protection Agreement of May 1936:

Length of Service	Separation Allowance
1 year and less than 2 years	3 months' pay
2 " " " " 3 "	6 " "
3 " " " " 5 "	9 " "
5 " " " " 10 "	12 " "
10 " " " " 15 "	12 " "
15 " " over	12 " "

In the case of an employee with less than one year's service, five days' pay, computed by multiplying by 5 the normal daily earnings (including regularly scheduled overtime, but excluding other overtime payments) received by the employee in the position last occupied, for each month in which he performed service, will be paid as the lump sum.

(a) Length of service shall be computed as provided in Section 7(b) of the Washington Job Protection Agreement, as follows:

For the purposes of this agreement, the length of service of the employee shall be determined from the date he last acquired an employment status with the employing carrier and he shall be given credit for one month's service for each month in which he performed any service (in any capacity whatsoever) and twelve (12) such months shall be credited as

one year's service. The employment status of an employee shall not be interrupted by furlough in instances where the employee has a right to and does return to service when called. In determining length of service of an employee acting as an officer or other official representative of an employee organization, he will be given credit for performing service while so engaged on leave of absence from the service of a carrier.

(b) One month's pay shall be computed by multiplying by 30 the normal daily earnings (including regularly scheduled overtime, but excluding other overtime payments) received by the employee in the position last occupied prior to time of his dismissal as a result of the Project.

(14) Whenever used herein, unless the context requires otherwise, the term "protective period" means that period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of six (6) years therefrom, provided, however, that the protective period for any particular employee during which he is entitled to receive the benefits of these provisions shall not continue for a longer period following the date he was displaced or dismissed than the employee's length of service, as shown by the records and labor agreements applicable to his employment prior to the date of his displacement or his dismissal.

(15)(a) In the event there arises any labor dispute with respect to the protection afforded by this agreement, or with respect to the interpretation, application or enforcement of the provisions of this agreement, not otherwise governed by Section (12)(c) hereof, the Labor-Management Relations Act, as amended, Railway Labor Act, as amended, or by impasse resolution provisions in a collective bargaining or protective agreement involving the Recipient and the Union, which

cannot be settled by the parties thereto within thirty (30) days after the dispute or controversy arises, it may be submitted at the written request of the Recipient or the union to a board of arbitration to be selected as hereinafter provided. One arbitrator is to be chosen by each interested party, and the arbitrators thus selected shall endeavor to select a neutral arbitrator who shall serve as chairman. Each party shall appoint its arbitrator within five (5) days after notice of submission to arbitration has been given. Should the arbitrators selected by the parties be unable to agree upon the selection of the neutral arbitration within ten (10) days after notice of submission to arbitration has been given, then the arbitrator selected by any party may request the American Arbitration Association to furnish, from among members of the National Academy of Arbitrators who are then available to serve, five (5) arbitrators from which the neutral arbitrator shall be selected. The arbitrators appointed by the parties shall, within five (5) days after the receipt of such list, determine by lot the order of elimination and thereafter each shall, in that order, alternately eliminate one name until only one name remains. The remaining person on the list shall be the neutral arbitrator. If any party fails to select its arbitrator within the prescribed time limit, the highest officer of the Union or of the Recipient or their nominees, as the case may be, shall be deemed to be the selected arbitrator, and the board of arbitration shall then function and its decision shall have the same force and effect as though all parties had selected their arbitrators. Unless otherwise provided, in the case of arbitration proceedings, under paragraph (5) of this agreement, the board of arbitration shall meet within fifteen (15) days after selection or appointment of the neutral arbitrator and shall render its decision within forty-five (45) days after the hearing of the dispute has been concluded and the record closed. The decision by majority vote of the arbitration board shall be final and binding as the decision of the arbitration board, except as provided in subparagraph (b)

below. All the conditions of the agreement shall continue to be effective during the arbitration proceedings.

(b) In the case of any labor dispute otherwise covered by subparagraph (a) but involving multiple parties, or employees of urban mass transportation employers other than those of the Recipient, which cannot be settled by collective bargaining, such labor dispute may be submitted, at the written request of any of the parties to this agreement involved in the dispute, to a single arbitrator who is mutually acceptable to the parties. Failing mutual agreement within ten (10) days as to the selection of an arbitrator, any of the parties involving may request the American Arbitration Association to furnish an impartial arbitrator from among members of the National Academy of Arbitrators who is then available to serve. Unless otherwise provided, in the case of arbitration proceedings under paragraph (5) of this agreement, the arbitrator thus appointed shall convene the hearing within fifteen (15) days after his selection or appointment and shall render his decision within forty-five (45) days after the hearing of the dispute or controversy has been concluded and the record closed. The conclusive upon all parties to the dispute. All the conditions of the agreement shall continue to be effective during the arbitration proceeding. Authority of the arbitrator shall be limited to the determination of the dispute arising out of the interpretation, application, or operation of the provisions of this agreement. The arbitrator shall not have any authority whatsoever to alter, amend, or modify any of the provisions of any collective bargaining agreement.

(c) The compensation and expenses of the neutral arbitrator, and any other jointly incurred expenses, shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(d) In the event of any dispute as to whether or not a particular employee was affected by the Project, it shall be his obligation to identify the Project-and specify the pertinent facts of the Project relied upon. It shall then be the Recipient's burden to prove that factors other than the Project affected the employee. The claiming employee shall prevail if it is established that the Project had an effect upon the employee even if other factors may also have affected the employee (Hodgson's Affidavit in Civil Action No. 825-71).

(e) Nothing in this agreement shall be construed to enlarge or limit the right of any party to utilize, upon the expiration of any collective bargaining agreement or otherwise, any economic measures which are not inconsistent or in conflict with applicable laws or this agreement.

(16) Nothing in this agreement shall be construed as depriving any employee of any rights or benefits which such employee may have under any existing job security or other protective conditions or arrangements by collective bargaining agreement or law where applicable, including P.L. 93-236, enacted January 2, 1974; provided that there shall be no duplication of benefits to any employees, and, provided further, that any benefit under the agreement shall be construed to include the conditions, responsibilities, and obligations accompanying such benefits.

(17) The Recipient shall be financially responsible for the application of these conditions and will make the necessary arrangements so that any employee affected as a result of the Project may file a claim through his union representative with the Recipient within sixty (60) days of the date he is terminated or laid off as a result of the Project, or within eighteen (18) months of the date his position with respect to his employment is otherwise worsened as a result of the Project; provided, in the latter case, if the events giving rise to the claim have occurred over an extended period, the

18-month limitation shall be measured from the last such event; provided, further, that no benefits shall be payable for any period prior to six (6) months from the date of the filing of the claim. Unless such claims are filed with the Recipient with said time limitations, the Recipient shall thereafter be relieved of all liabilities and obligations related to said claims. The Recipient will fully honor the claim, making appropriate payments, or will give notice to the claimant and his representative of the basis for denying or modifying such claim, giving reasons therefor. In the event the Recipient fails to honor such claim, the Union may invoke the following procedures for further joint investigation of the claim by giving notice in writing of its desire to pursue such procedures. Within ten (10) days from the receipt of such notice, the parties shall exchange such factual material as may be requested of them relevant to the disposition of the claim and shall jointly take such steps as may be necessary or desirable to obtain from any third party such additional factual materials as may be relevant. In the event the claim is so rejected by the Recipient, the claim may be processed to arbitration as hereinabove provided by paragraph (15). Prior to the arbitration hearing, the parties shall exchange a list of intended witnesses. In conjunction with such proceedings, the impartial arbitrator shall have the power to subpoena witnesses upon the request of any party and to compel the production of documents and other information denied in the pre-arbitration period which is relevant to the disposition of the claim.

Nothing included herein as an obligation of the Recipient shall be construed to relieve any other urban mass transportation employer of the employees covered hereby of any obligations which it has under existing collective bargaining agreements, including but not limited to obligations arising from the benefits referred to in paragraph (10) hereof, nor make any such employer a third-party

beneficiary of the Recipient's obligations contained herein, nor deprive the Recipient of any right of subrogation.

(18) During the employee's protective period, a dismissed employee shall, if he so requests, in writing, be granted priority of employment to fill any vacant position within the jurisdiction and control of the Recipient, reasonably comparable to that which he held when dismissed, for which he is, or by training or retraining can become, qualified; not, however, in contravention of collective bargaining agreements related thereto. In the event such employee requests such training or re-training to fill such vacant position, the Recipient shall provide for such training or re-training at no cost to the employee. The employee shall be paid the salary or hourly rate provided for in the applicable collective bargaining agreement for such position, plus any displacement allowance to which he may be otherwise entitled. If such dismissed employee who has made such request fails, without good cause, within ten (10) days to accept an offer of a position comparable to that which he held when dismissed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such ten-day period, forfeit all rights and benefits under this agreement.

As between employees who request employment pursuant to this paragraph, the following order where applicable shall prevail in hiring such employees:

(a) Employees in the craft or class of the vacancy shall be given priority over employees without seniority in such craft or class;

(b) As between employees having seniority in the craft or class of the vacancy, the senior employees, based upon their service in that craft or class, as shown on the

appropriate seniority roster, shall prevail over junior employees;

(c) As between employees not having seniority in the craft or class of the vacancy, the senior employees, based upon their service in the crafts or classes in which they do have seniority as shown on the appropriate seniority rosters, shall prevail over junior employees.

(19) This agreement shall be binding upon the successors and assigns of the parties hereto, and no provisions, terms, or obligations herein contained shall be affected, modified, altered, or changed in any respect whatsoever by reason of the arrangements made by or for the Recipient to manage and operate the system.

Any such person, enterprise, body, or agency, whether publicly - or privately-owned, which shall undertake the management or operation of the system, shall agree to be bound by the terms of this agreement and accept the responsibility for full performance of these conditions.

(20) The employees covered by this agreement shall continue to receive any applicable coverage under Social Security, Railroad Retirement, Workmen's Compensation, unemployment compensation, and the like. In no event shall these benefits be worsened as a result of the Project.

(21) In the event any provision of this agreement is held to be invalid, or otherwise unenforceable under the federal, State, or local law, in the context of a particular Project, the remaining provisions of this agreement shall not be affected and the invalid or unenforceable provision shall be renegotiated by the Recipient and the interested union representatives of the employees involved for purpose of adequate replacement under 13(c) of the Act. If such negotiation shall not result in mutually satisfactory

agreement, any party may invoke the jurisdiction of the Secretary of Labor to determine substitute fair and equitable employee protective arrangements for application only to the particular Project, which shall be incorporated in this agreement only as applied to that Project, and any other appropriate action, remedy, or relief.

(22) This agreement establishes fair and equitable employee protective arrangements for application only to federal operating assistance Projects under §§3(h) and 5 of the Act and shall not be applied to other types of assistance under §5 or under other provisions of the Act, in the absence of further understandings and agreements to that effect.

(23) The designated Recipient, as hereinabove defined, signatory hereto, shall be the sole provider of mass transportation services to the Project and such services shall be provided exclusively by employees of the Recipient covered by this agreement, in accordance with this agreement and any applicable collective bargaining agreement. The parties recognize, however, that certain of the recipients signatory hereto, providing urban mass transportation services, have heretofore provided such services through contracts by purchase, leasing, or other arrangements and hereby agree that such practices may continue. Whenever any other employer provides such services through contracts by purchase, leasing, or other arrangements with the Recipient, or on its behalf, the provisions of this agreement shall apply.

(24) An employee covered by this agreement, who is not dismissed, displaced, or otherwise worsened in his position with regard to his employment as a result of the Project, but who is dismissed, displaced, or otherwise worsened solely because of the total or partial termination of the Project, discontinuance of Project services, or exhaustion of Project funding, shall both be deemed eligible for a dismissal or

displacement allowance within the meaning of paragraphs (6) and (7) of this agreement.

(25) If any employer of the employees covered by this agreement shall have rearranged or adjusted its forces in anticipation of the Project, with the effect of depriving an employee of benefits to which he should be entitled under this agreement, the provisions of this agreement shall apply to such employee as of the date when he was so affected.

(26) Any eligible employer not initially a party to this agreement may become a party by serving written notice of its desire to do so upon the Secretary of Labor, the American Public Transit Association, or its designee, and the unions signatory hereto, or their designee. In the event of any objection to the addition of such employer as a signatory, then the dispute as to whether such employer shall become a signatory shall be determined by the Secretary of Labor.

(27) In the context of a particular Project, any other union which is the collective bargaining representative of urban mass transportation employees in the service area of the Recipient, and who may be affected by the assistance to the Recipient within the meaning of 49 U.S.C.A. 1609(c), may become a party to this agreement as applied to the Project, by serving written notice of its desire to do so upon the other union representatives of the employees affected by the Project, the Recipient, and the Secretary of Labor. In the event of any disagreement that such labor organization should become a party to this agreement, as applied to the Project, then the dispute as to whether such labor organization shall participate shall be determined by the Secretary of Labor.

(28) This agreement shall be effective and be in full force and effect for the period from November 26, 1974 to and including September 30, 1977. It shall continue in effect

thereafter from year to year unless terminated by the A.P.T.A. or by the national labor organizations signatory hereto upon one hundred twenty (120) days' written notice prior to the annual renewal date. Any signatory employer or labor organization may individually withdraw from the agreement effective October 1, 1997, or upon any annual renewal date thereafter, by serving written notice of its intention so to withdraw one hundred twenty (120) days prior to the annual renewal date; provided, however, that any rights of the parties hereto or of individuals established and fixed during the term of this agreement shall continue in full force and effect, notwithstanding the termination of the agreement or the exercise by any signatory of the right to withdraw therefrom. This agreement shall be subject to revision by mutual agreement of the parties hereto at any time, but only after the serving of a sixty (60) days' notice by either party upon the other.

(29) In the event any project to which this agreement applies is approved for assistance under the Act, the foregoing terms and conditions shall be made part of the contract of assistance between the federal government and the Recipient or other applicant for federal funds; provided, however, that this agreement shall both merge into the contract of assistance but shall be independently binding and enforceable by and upon the parties thereto, in accordance with its terms, nor shall any other employee protective agreement nor any collective bargaining agreement merge into this agreement, but each shall be independently binding and enforceable by and upon the parties thereto, in accordance with its terms.

IN WITNESS WHEREOF, the parties hereto have executed this agreement by their duly authorized representatives.

AMERICAN PUBLIC TRANSIT ASSOCIATION
By: /s/ Stanley H. Gates, Jr. and /s/ B.R. Stokes
7/23/75

AMALGAMATED TRANSIT UNION, AFL-CIO
By: /s/ D. V. Maroney, Jr. 7-23-75

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO
By: /s/ Matthew Guinan 7-23-75

RAILWAY LABOR EXECUTIVES ASSOCIATION
American Railway Supervisors' Association
American Train Dispatcher's Association
Brotherhood of Locomotive Engineers
Brotherhood of Maintenance of Way Employes
Brotherhood of Railway Signalmen
Brotherhood Railway Carmen of the U.S. & Canada
Brotherhood of Sleeping Car Porters
Hotel & Restaurant Employes
Bartenders International Union
International Association of Machinists
Aerospace Workers
International Brotherhood of Boilermakers and
Blacksmiths
International Brotherhood of Electrical Workers
International Brotherhood of Firemen & Oilers
International Organization Masters Mates
& Pilots of America
National Marine Engineers' Beneficial Association
Railroad Yardmasters of America
Railway Employes' Department, AFL-CIO
Seafarers' International Union of North America
Sheet Metal Workers' International Association
Transport Workers Union of America

United Transportation Union
By: /s/ C. J. CHAMBERLIN and /s/ William J. Hickey
7-31-75

BROTHERHOOD OF RAILWAY AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES
By: /s/ C. L. DENNIS 7-31-75

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, By:
/s/ William E. Skutt 7-31-75

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS,
By: /s/ John F. Peterpaul 7-31-75

The Gill Memorandum: The Gill Memorandum is a supplemental document to the National (Model) Section 13(c) Agreement.

MEMORANDUM TO THE SECRETARY OF LABOR

The parties have agreed on the following proposals as to administrative use of the national agreement in processing applications for operating assistance under Section 13(c) of the Urban Mass Transportation Act of 1964, as amended:

1. Immediately upon execution of the agreement by the national officers, they and the Secretary should urge the local parties to sign the agreement as promptly as possible.

2. Local parties who nevertheless elect not to sign the agreement will not be legally bound by it; in processing any cases involving such non-signatory parties, it will be discretionary with the Secretary as to how he will utilize the

standards set forth in the national agreement as guidelines. The failure of local parties to sign the agreement may be a factor to be considered by the Secretary in determining whether there are special circumstances under paragraph 5 below. Similarly, the existence of any legal disabilities preventing a recipient from complying with portions of the agreement, or other special questions of application of Section 13(c), may be factors to be considered under paragraph 5.

3. The protective arrangements set forth in the national agreement shall be available to all affected employees and binding on all such employees covered by the agreement.

4. Individual project notices, full documentation, and individual project sign-off procedures, under current practices and policies of the Department of Labor, should continue .

5. Individual project review by the Secretary of Labor shall be given at the request of any interested parts, to determine whether special circumstances are presented by the project which require changes in the master agreement or supplemental arrangements, as applied to the particular project.

6. In the event it is determined by the Secretary that changes or supplemental arrangements are required, there should be an opportunity to negotiate such arrangements and changes in accordance with existing case-handling procedures prior to any Secretarial determination of the disputed issues.

7. The scope of the master agreement shall not include federal operating assistance for dial-a-ride, taxi, jitney, van pooling, car pooling, subscription service, or other forms of paratransit services. The master agreement shall similarly not

cover or be applied to special operating assistance for projects for the elderly and handicapped.

8. In regard to any other non-covered capital, operating, or demonstration project, the interested parties shall retain their right to individual negotiation of fair and equitable employee protective arrangements for the particular project under existing case-handling procedures wherein the interested parties will determine for themselves whether and to what extent the master agreement shall be made applicable to such project; if no agreement is reached by the parties, the Secretary's regular case-handling procedures shall be utilized.

9. The parties will set up an appropriate standing committee to consult with and assist the Secretary and his staff on problems which arise in the administrative use of the national agreement

/s/

Lewis M. Gill, Special Mediator

July 18, 1975

Supreme Court, U.S.
FILED
APR 5 2002

(2)

No. 01-939

In the Supreme Court of the United States

LYN SWONGER AND JAMES SPAULDING, ET AL.,
PETITIONERS

v.

SURFACE TRANSPORTATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 49 U.S.C. 11341(a) and 11347 (1994) allow the modification of seniority rights as part of a federally authorized merger of two railroad operations.

2. Whether the modification of seniority rights and relocation of a railroad terminal were necessary to the merger where they enhanced the public transportation benefit arising from the merger and facilitated more efficient operations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 265 F.3d 1135. The decision of the Surface Transportation Board (Pet. App. 18-26) is unreported. The decision of the arbitrator (Pet. App. 27-34) is also unreported.

JURISDICTION

The court of appeals entered its judgment on September 19, 2001. The petition for a writ of certiorari was filed on December 18, 2001. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Railroads wishing to consolidate or merge their properties must first obtain regulatory approval from the Surface Transportation Board (Board). See 49 U.S.C. 11323-11326 (Supp. V 1999). The Board may approve a proposed consolidation if it finds that the transaction is in the public interest, 49 U.S.C. 11324(c) (Supp. V 1999), taking into account such public benefits as cost reductions, service improvements, and efficiency gains. See, *e.g.*, *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233, 363-364 (1996), aff'd *sub nom. Western Coal Traffic League* v. *Surface Transp. Bd.*, 169 F.3d 775 (D.C. Cir. 1999). Once a consolidation is approved by the Board, the railroad may implement the merger and, in so doing, "is exempt from the antitrust laws and from all other law," 49 U.S.C. 11321(a) (Supp. V 1999),[1] which can include legal obligations under a collective bargaining agreement, see *Norfolk & Western Ry.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 127-130 (1991).

When large railroads merge, the Board is required to impose certain conditions for the protection of affected railroad employees. 49 U.S.C. 11326 (Supp. V 1999).[2] That Section requires a "fair arrangement" for employees affected by the merger, 49 U.S.C. 11326(a) (Supp. V 1999), and incorporates the protections of the Rail Passenger Service Act, 45 U.S.C. 565 (1988), for "the preservation of rights, privileges, and benefits" under existing collective bargaining agreements. The Board's

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[1] Prior to the 1995 Act terminating the Interstate Commerce Commission, Pub. L. No. 104-88, 109 Stat. 803, this provision was codified at 49 U.S.C. 11341(a).

[2] Prior to the 1995 Act terminating the Interstate Commerce Commission, this provision was codified at 49 U.S.C. 11347.

predecessor, the Interstate Commerce Commission, further identified a series of specific conditions for the protection of employees in *New York Dock Railway—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60, 84-90, aff'd, 609 F.2d 83 (2d Cir. 1979). See Pet. App. 44-56. As relevant here, the *New York Dock* conditions require that the

> rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

360 I.C.C. at 84.

Under 49 U.S.C. 11321(a) (Supp. V 1999), an agreement or arbitration order implementing a merger may displace provisions of collective bargaining agreements to the extent "necessary." See also *Norfolk*, 499 U.S. at 127-128. Abrogation of the collective bargaining agreement's terms is "necessary" if (1) some transportation benefit, such as enhanced efficiency or greater safety, will result from the underlying transaction, and (2) there is a nexus between the changes sought and effectuation of the Board-approved transaction. *United Transp. Union* v. *Surface Transp. Bd.*, 108 F.3d 1425, 1430-1431 (D.C. Cir. 1997).

Before any operational changes affecting employees can be made, carriers must negotiate with their unions. If those negotiations fail, the parties must submit to binding arbitration. *New York Dock*, 360 I.C.C. at 85. The arbitral decision can be appealed to the Board under the limited standard of review

established in *Chicago & North Western Transportation Co.—Abandonment—Near Dubuque & Oelwein, IA*, 3 I.C.C.2d 729, 735-736 (1987), aff'd *sub nom. IBEW* v. *ICC*, 862 F.2d 330 (D.C. Cir. 1988); see also 49 C.F.R. 1115.8. Under that standard, the Board's review of arbitrators' decisions is generally limited to "recurring or otherwise significant issues of general importance regarding the interpretation of [its] labor protective conditions." 3 I.C.C.2d at 736. The Board does not overturn an arbitrator's resolution of factual disputes in the absence of "egregious error." *Id.* at 735-736.

2. Petitioners are former employees of the now-defunct Rock Island and Pacific Railroad Company on its Tucumcari line out of Pratt, Kansas. In 1980, the St. Louis Southwestern Railway Company (St. Louis Railway) acquired the Tucumcari Line from the bankrupt Rock Island. Petitioners were hired by the St. Louis Railway and were given preference on Tucumcari line work over other St. Louis Railway employees, even though petitioners' system-wide "seniority date"—the date normally used to determine priority in bidding for work—was their date of hire by the St. Louis Railway. Pet. App. 4.

In 1996, the Board approved the merger of Union Pacific Railroad Company and the St. Louis Railway's parent company, the Southern Pacific Rail Corporation. Through the merger, Union Pacific acquired all of the rail carriers controlled by Southern Pacific, including the St. Louis Railway. Pet. App. 4. The Board approved the merger as in the public interest because, among other things, it would lead to greater efficiencies that would result in improved and less costly rail service. See *Union Pacific/Southern Pacific Merger*, 1 S.T.B. at 363-364. Among the promised efficiencies were the streamlining and consolidation of operations

through the use of a "hub and spoke" system, with one of the hubs located at Salina, Kansas, and encompassing the Tucumcari Line. Pet. App. 19.

After notice was formally given and negotiations were held, Union Pacific and the United Transportation Union (Union)—representing all conductors, foremen, brakemen, and yardmen affected by the implementation of the Salina Hub, including petitioners—reached a tentative implementing agreement for the Salina Hub. Pet. App. 27-28. Under the tentative agreement, employees from several districts, who had been governed by different collective bargaining agreements, would be put under a single agreement, with their seniority dovetailed based upon the employee's seniority date. Preference in bidding for work would be based on system-wide seniority, with one exception: no employee would lose existing "prior rights" seniority as to the rail lines on which he had originally worked vis-a-vis other employees who also worked on those lines before the merger. Thus, petitioners would retain their preference over former St. Louis Railway employees in bidding for work on the Tucumcari Line, but they would have to compete with other Union Pacific employees based on their relative system-wide seniority. *Id.* at 5, 29.

3. Dissatisfied with their limited preference and with the decision to site the "home terminal" at Herington, Kansas, rather than Pratt, Kansas, petitioners' local union official objected to the tentative agreement. The dispute was submitted to binding arbitration.

The arbitrator found the tentative agreement to be a fair and equitable method of blending the rights of all affected employees. Pet. App. 27-34. The arbitrator concluded that a public transportation benefit would result from the hub-and-spoke operation at Salina and

that both the seniority provisions and the establishment of Herington as the home terminal were related to the successful implementation of that hub-and-spoke operation. *Id.* at 31-32, 34. The arbitrator found no merit to petitioners' arguments that the agreement was unfair to them or that the changes it put into place were not necessary. *Id.* at 31-34.

The Board affirmed. Pet. App. 18-26. Characterizing petitioners' appeal as presenting a fact-bound challenge to the public transportation benefits arising from the seniority and hub-location changes (*id.* at 24), the Board sustained the arbitrator's decision because petitioners "failed to show that the arbitrator committed egregious error in making these findings," *ibid.*[3]

4. The court of appeals affirmed. Pet. App. 1-17. Tracking the decision of the D.C. Circuit in *United Transportation Union* v. *Surface Transportation Board*, 108 F.3d 1425 (1997), the court of appeals recognized that seniority rights must be modified in some manner in nearly all railroad mergers. The court accordingly ruled that the Board's determination that seniority rights can be modified when necessary to carry out an approved consolidation is reasonable and effectuates congressional intent. Pet. App. 9-10. The court further agreed with the Board and the D.C. Circuit that "the necessity standard does not require a finding by the arbitrator and the [Board] that the merger could not be effectuated without the specific changes that are proposed for the petitioners' seniority rights and for the designation of their home terminal."

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[3] Petitioners' request for a stay was denied. The Salina Hub was implemented on May 1, 1999, and thus has now been in operation for almost three years. See *Spaulding* v. *United Transp. Union*, 279 F.3d 901, 907 (10th Cir. 2002).

Id. at 10. Rather, it is sufficient if (1) "some transportation benefit flow[s] from the underlying transaction," and (2) there is "a nexus between the changes sought and the effectuation of an approved transaction." *Id.* at 11. The court then found that the arbitrator adequately demonstrated that the proposed agreement satisfied those requirements, with respect to both the modification of seniority rights and the relocation of the home terminal. *Id.* at 11-14.

ARGUMENT

The court of appeals' decision is consistent with decisions of this Court and other circuits. Accordingly, petitioners' record-bound challenge to the specific terms of their railway's merger agreement does not merit this Court's review.

1. Petitioners argue (Pet. 11-18) that the court of appeals erred in concluding that seniority rights may be modified as part of a merger agreement because they are not the types of "rights, privileges, and benefits" for which 49 U.S.C. 11326 (Supp. V 1999) and *New York Dock* require collective bargaining. Petitioners, however, fail to identify any conflict with this Court's prior decisions. To the contrary, the court of appeals' decision is fully consistent with this Court's decision in *Norfolk & Western Railway* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117 (1991), as evidenced by the petition's reliance on the *dissenting* opinion in that case. See Pet. 11-12. In *Norfolk*, this Court held that the merging carriers' exemption from "all other law" in 49 U.S.C. 11321(a) (Supp. V 1999), "extends to its legal obligations under a collective-bargaining agreement." 499 U.S. at 119. In so holding, the Court recognized that "consolidations in the public interest" can result in,

among other things, "the loss of seniority rights." *Id.* at 132-133.

Petitioners also fail to identify any conflict in the circuits. Quite the opposite, the court of appeals here deliberately tracked the decision of the only other court of appeals that has addressed the question—the D.C. Circuit in *United Transportation Union* v. *Surface Transportation Board*, 108 F.3d 1425 (1997). See Pet. App. 8-9. In *United Transportation Union*, the D.C. Circuit, like the court of appeals here (*id.* at 8), sustained the Board's conclusion that "rights, privileges, and benefits" are those collective "incidents of employment, ancillary emoluments or fringe benefits" like life insurance, medical care, and sick leave, but do not extend to such individualized concerns as seniority. See 108 F.3d at 1429-1430. Indeed, the D.C. Circuit concluded that the Board's interpretation "is exactly what was intended by Congress." *Id.* at 1430.

Petitioners' alternative focus (Pet. 12-16) on seniority rights as protected "rates of pay, rules, working conditions" fares no better. That argument was not addressed by the court of appeals. See Pet. App. 7 ("[Petitioners] argue, seniority rights are 'rights, privileges, and benefits.'"). Indeed, petitioners agree (Pet. 5-6) that their argument below focused on the "rights, privileges, and benefits" language, rather than the "rates of pay, rules, working conditions" terminology on which they now rely. Moreover, petitioners' new argument has not been addressed by any other court of appeals, so a grant of certiorari to address it here would be both inappropriate and premature.

Finally, petitioners' argument fails to come to grips with the substantial deference owed to the Board's construction of ambiguous statutory language and its interpretation of the scope of the *New York Dock* protec-

tions. See, *e.g.*, *Barnhart* v. *Walton*, No. 00-1937 (Mar. 27, 2002), slip op. 9.

2. Petitioners also contend (Pet. 18-29) that the court of appeals erred in holding that the modification of seniority rights and relocation of the home terminal were "necessary" to effectuate the merger in a sensible and efficient manner. Again, however, petitioners identify no inconsistency between the court of appeals' ruling and the decision of this Court in *Norfolk*, *supra*, or the decisions of other circuits. To the contrary, the court's analysis echoed the D.C. Circuit's resolution of the same question in *United Transportation Union*. There, the D.C. Circuit, like the court of appeals here (Pet. App. 10-12), ruled that the necessity standard requires only a nexus between the proposed changes and the public benefits arising from the merger. See 108 F.3d at 1430-1431; see also *Railway Labor Exec. Ass'n* v. *United States*, 987 F.2d 806, 815 (D.C. Cir. 1993).

The dearth of additional circuit court authority evidences the infrequency with which this issue arises—a point that petitioners acknowledge (Pet. 21). That factor further weighs against an exercise of this Court's certiorari jurisdiction.

Finally, petitioners' argument confessedly reduces to a record-bound challenge to the "application of facts to law." Pet. 25; see Pet. App. 24 (Board characterizes argument as a challenge to arbitrator's factual findings). This Court, however, does not sit to review the particularized application of law to facts in individual cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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